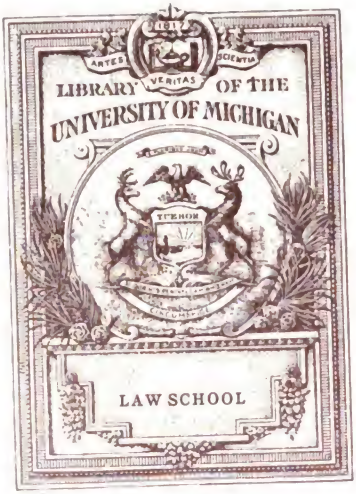

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W. C. Wilson

REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

VOLUME XXIV.

NEW SERIES,
BY JOHN F. DEANE,
COUNSELLOR AT LAW.
VOLUME I.

BELLOWS FALLS:
PUBLISHED BY O. H. PLATT.
1853.

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JUDGES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

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ERRATA.

Page 42, lines 1, 2, and 3 from top, for "*Up*" read "*Rep.*"
" 126, line 11 from bottom, for "*wherever*" read "*whenever.*"
" 195, line 13 from top, for "*promiser*" read "*promisee.*"
" 207, line 13 from bottom, for "*carried*" read "*carved.*"
" 265, line 15 from top, for "*part*" read "*fact.*"
" 316, line 17 from top, for "*choice*" read "*charge.*"
" 363, line 7 from top, in note after "*creditors*" read "*of.*"
" 408, line 7 from bottom, for "*solicits*" read "*which.*"
" 494, line 11 from bottom, for "*their*" read "*the.*"

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF CALEDONIA,

AUGUST TERM, 1850.

[Continued from Vol. 22, page 560.]

The opinion was delivered at the special Session at MONTPELIER, Sept. Term, 1851.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, }
HON. MILO L. BENNETT, } ASSISTANT JUDGES.
HON. LUKE P. POLAND, }

E. & T. FAIRBANKS & CO. *v.* MOSES KITTREDGE AND CHAS. STARKS.

Listers — When their acts are judicial, and when ministerial. Property to be set in School Districts, &c. Act of 1847, *ministerial.*

The appraisals and assessments which Listers are commissioned to make, (as also, whenever it is the evident intention of the law that they shall act solely upon their own judgment and discretion,) are of a judicial character, and they incur no personal responsibility, when not actuated by malice.

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But in regard to the other duties enjoined upon the Listers, their acts, for the most part, if not universally, are ministerial.

The duty of the Listers under the Act of 1847, Sec. 1, to "set in the list the appraised value of all real and personal estate in each school district severally," was in its character wholly ministerial.

And where the members of a firm carried on business in school district No. 1, and their personal property, on the first day of April, 1848, was in said district, except such as they had sent abroad for sale; it was held, that the Statute does not authorize an ideal separation of their joint property, so as to set a portion of the property in school district No. 2, where one of the partners resided, but the property should be designated as being in school district No. 1, where a portion was actually situated, — where the partnership business was carried on, and where a majority of the partners resided.

And if the firm suffer any injury and damage from the Listers setting their property or a part thereof in some other school district, they will be liable, and the firm can sustain an action against them.

TRESPASS ON THE CASE. This was an action against the defendants, as listers for the town of St. Johnsbury, for the year 1848.

The defendants pleaded the general issue, which by agreement was tried by the court. Upon the trial, the following facts appeared in evidence, and were found by the court. On the first day of April, 1848, and for several years previous thereto, the plaintiffs were partners carrying on an extensive business, in the manufacture of scales, plows, &c. All of said firm except Joseph P. Fairbanks, resided on the first day of April, 1848, in school district No. 1, in St. Johnsbury, where also were situated all the factories, furnaces and other buildings, in which the plaintiffs business was carried on, and also their store, and counting-room. On the first day of April, 1848, and for some time previous, Joseph P. Fairbanks resided in school district No. 2, in St. Johnsbury.

The defendants, and one other, were duly elected listers of St. Johnsbury, in March, 1848, and performed the duties of listers for that year, but the list was signed and sworn to by these defendants only. The real estate of the plaintiffs was set in the list at the sum of $23,570; of this sum, $1,040, was situated in school district No. 2, and the remainder in other districts in the town, and was so designated by the listers.

The personal estate of the plaintiffs was appraised at $40,000,

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three-fourths of which was set in the list, by the listers in district No. 1, and one-fourth in district No. 2,—making the whole amount of the plaintiffs list which was set in district No. 2, $110,40.

The plaintiffs had no personal property situated in fact, in district No. 2, but a portion of their personal property was at their works in district No. 1, and the remainder was situated in different places in this State, and deposited in various places in the United States, and some even out of the United States, in Canada and Cuba.

It also appeared, that on the fifth day of July, 1849, a tax of $125, was voted on the list in district No. 2, being 12 per cent. on the list, for the purpose of grading and fencing around the schoolhouse, which tax was duly assessed by the committee of said district, and the plaintiffs tax amounted to the sum of $13,24, which they refused to pay, except the sum which was raised on the plaintiffs real estate, which was situated in district No. 2. A rate-bill and warrant was duly made, and issued thereon, and the property of Joseph P. Fairbanks was taken and sold by the collector to pay the same. The sum so paid by the said Joseph P. Fairbanks for this tax and costs, was subsequently paid by the plaintiffs to the said Joseph P. Fairbanks, before the commencement of this suit.

It also appeared that a tax was voted in district No. 1, in 1849, and a tax bill was made out thereon, in which the plaintiffs were assessed upon so much of their list as was designated by the listers as belonging to district No. 1, which tax amounted to $69,90. Said tax bill was afterwards amended, by adding the sum of $100, of grand list, which had been so designated by the listers as belonging to district No. 2, for the plaintiffs personal property, on which a further tax of $14, was made up against the plaintiffs, which was voluntarily paid by them. The tax so voted in district No. 1, was at the rate of 14 cents on the dollar of the grand list.

Upon the foregoing facts, the county court, June Term, 1850, rendered judgment in favor of the defendants.

EXCEPTIONS by the plaintiffs.

S. W. Slade, and Bartlett & Bingham for plaintiffs.

The Listers have no discretion, they are required to specify the estate, with the value which they have put upon it, in the list,

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which is situated in each district, and which the law has made subject to taxes in each district; this duty or act of the listers is purely ministerial. The liability of listers for such acts has been fully settled in this State; *Henry* v. *Edson et al.*, 2 Vt. 499. *Cong. Society of Poultney* v. *Ashley et al.*, 10 Vt. 241. *Kellogg* v. *Higgins et al.*, 11 Vt. 240. *Howard* v. *Shumway et al.*, 13 Vt. 358. *Fuller* v. *Gould et al.*, 20 Vt. 643.

If persons having a limited authority, do any act beyond the scope of their authority, they make themselves trespassers. *Blood* v. *Sayre*, 17 Vt. 609.

E. Paddock for defendants.

Although the listers *may* have done wrong in designating the $10,000 of Joseph P. Fairbanks' property as situated in district No. 2, yet no action lies against them for it, especially if the listers acted in good faith, exercising the best of their judgment, within the scope of their authority. Listers in taking a schedule of property, act ministerially, but in putting a value upon such property, and in designating the situation of personal property in the several school districts, they act judicially, and no action lies against them for error, any more than it would against a court of law, which should judge erroneously. It was so adjudged in the case of *Fuller* v. *Gould et al.*, 20 Vt. 643.

The opinion of the court was delivered by

Royce, Ch. J. This was an action of trespass on the case, brought against the defendants as listers of the town of St. Johnsbury, for the year 1848. The defendants were charged with having wrongfully divided the plaintiffs' list of personal property, designating a fourth part of the property as being in school district No. 2, when it should all have been designated as in district No. 1.

It is made a point of defense, that the duty of the defendants, in reference to the matter complained of, was of a judicial character; and that they are consequently shielded from personal liability, though they may have acted in a manner not warranted by law. There is no doubt, that in many things the acts of listers so far partake of that character, that they will incur no personal responsibility when not actuated by malice. This may generally be said of the appraisals and assessments which they are commis-

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sioned to make, as also, wherever it is the evident intention of the law, that they shall act solely upon their own judgment and discretion. *Fuller* v. *Gould et al.*, 20 Vt. 643. But in regard to the other duties enjoined upon listers, their acts for the most part, if not universally, are ministerial. And this is so, whether the legal requirement is plain and obvious, or in some degree doubtful and obscure; for they are not a board for the construction of statutes. Of this the case of *Kellogg* v. *Higgins et al.*, 11 Vt. 240, furnishes strong evidence by analogy; though it related to the acts of selectmen. We are satisfied that the duty of the defendants, under the act of A. D. 1847, Sec. 1, to "set in the list the appraised value of all real and personal estate in each district, severally," was in its character wholly ministerial. Now it is well settled, that if the list is made up and authenticated in regular form, it will protect the proper officers in the assessment and collection of taxes upon it. And hence, to prevent a failure of justice, the listers must be held liable for the consequences of illegal acts committed in the course of their proceedings. *Henry* v. *Edson et al.*, 2 Vt. 499. *Howard* v. *Shumway et al.*, 13 Vt. 358.

The next inquiry is, whether any personal estate of the plaintiffs' could legally be set in the list as being in school district No. 2. It appears from the case that no part of their personal property was kept in that district, but that all which had not been sent abroad was in district No. 1. The only ground for supposing that any portion could rightfully be designated as being in the other district, where one of the partners lived, must therefore be sought in the well-known principle of common law, in relation to personal estate,—that it is considered as attendant upon the person of the owner, and as having no other *situs* than his domicil or residence. But with us the strictness of that principle is in many cases modified by statutory provisions, which, for purposes of taxation, give distinct locality to moveables. Thus, by the act of A. D. 1841, Sec. 12, partners in mercantile or other business, may be jointly assessed by their partnership name, in the town where their business is carried on, for all their personal property employed in the business, whether they reside in the same or different towns. That enactment comprised in its operation the personal property in the plaintiffs' partnership, both at home and abroad. It was all brought within the cognizance and jurisdiction of the defendants

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as listers; a part being present in fact, and the rest constructively present for the purposes of their action. By the act of A. D. 1847, they were required to give it locality, with a view to taxation for school district purposes. They were evidently bound, in conformity with the fact, to treat all the property which was at home on the first day of April, A. D. 1848, as having its location in district No. 1. The words already recited from the first section of the act would appear to admit no other construction. And we consider that the residue should also have been so treated. We discover nothing in the statute to authorize an ideal separation of this joint property; nor do we think that such a result would be produced by an application of the common law rule, upon which the defendants seem to have relied. It would seem that even that theory, as applied to a partnership in active operation, must sooner refer the *situs* of their personal effects to the *business domicil of the firm*, (if such an expression may be allowed,) than to that of each partner, individually. For in the latter case, it would either suppose a distribution of the effects among the partners, or an independent control by each partner over a portion; both of which are at variance with all common experience and observation. We therefore conclude, that the whole property should have been designated as being in the district where a portion of it was actually situated, where the partnership business was carried on, and where a majority of the partners resided.

But it is insisted, that if the defendants have incurred a liability, it is not to these plaintiffs, but to Joseph P. Fairbanks alone; inasmuch as his individual property was distrained and sold to satisfy the tax. To this objection, however, we think the case discloses a satisfactory answer. Had the taking and sale of the property been wrongful, by reason of positive illegality in the tax, he alone could have sustained an action for the trespass or tort. So likewise, had the taking or sale been rendered tortious by illegality in the collector's proceedings. In short, any action founded on this seizure and sale, as the immediate cause of action, must have been prosecuted by Joseph P. Fairbanks, as sole plaintiff. But the list made by these defendants became the basis on which the committee and collector of the district were legally authorized to act, and the regularity of their doings is not questioned. Consequently, the seizure and sale of the property were

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not wrongful, and of themselves, constituted no legal injury. The only remedy, therefore, to which Joseph P. Fairbanks could claim to be entitled, would be an action like the present, founded on the illegal act of the defendants in dividing the partnership list. But it would seem, that if any injury resulted from that act, it must be an injury to the partners collectively, and not simply to any one member of the firm. And that such was in fact the case, provided any injury has been occasioned, is sufficiently manifest. Each partner being holden by express statute for the whole of a joint tax against his firm, it follows that if one partner satisfies such a tax, whether by voluntary payment, or by collection legally enforced against him, the firm become at once bound to reimburse him. He has paid their debt in obedience to the law. The reimbursement of Joseph P. Fairbanks, by the plaintiffs, is not, therefore, to be deemed an officious and merely voluntary act, but as the performance of a legal obligation. And the injury, if any, for which they have brought their action, thus became consummated as an injury to them. We have no occasion to inquire whether Joseph P. Fairbanks could have sued alone before he was reimbursed; since we are satisfied that he could not after.

It remains to inquire, whether the case shows any such evident damage and injury to have occurred to the plaintiffs, as necessarily to render the judgment against them in the court below, erroneous. No complaint is made as to the aggregate sum at which the personal estate of the plaintiffs was set in the list, but only that a portion of it was subjected to taxation in the wrong school district. And the case furnishes no test by which to determine whether any injury to the plaintiffs was thereby produced, except the comparative rate of taxation in the two districts. But that was a trifle less in district No. 2, than in No. 1. It would seem, therefore, that the plaintiffs rather gained than lost, by the wrongful location which the listers assigned to the ten thousand dollars of personal property. It appears, indeed, that, after the two districts had voted their respective taxes, and the sum set to the plaintiffs in the second district, was added to the amount standing against them in the first; and that they voluntarily paid a tax upon it in that district. But as that proceeding was not shown to have been authorized or sanctioned by any competent authority, we think it was entitled to no influence in the

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trial. On the whole, we see nothing in the case which imperatively required the county court to find that the plaintiffs had sustained any injury. And hence, although the other questions involved in the case are now determined in favor of the plaintiffs, the judgment below must be affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF CHITTENDEN,

DECEMBER TERM, 1851.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

HENRY C. BLACKMAN *v.* EDWARD H. GREEN & JOHN E. SHORT.

Assumpsit on promissory note. The Insolvent Laws of Massachusetts.

Where a note was neither executed nor payable in Massachusetts, nor did the plaintiff or his factors reside there,—*held*, that the insolvent laws of Massachusetts could have no operation upon the rights of the plaintiff or his factors, without their express or implied consent.

When the purchaser, for goods bought of commission merchants or factors draws the note payable to the order of the signers, and the indorsement was simultaneous with the signing of the note, and was essential to render the instrument operative, it must be regarded in effect as a note to the plaintiff or the owner of the goods.

And upon the insolvency of the signers of the note, if the factors, without the knowledge or consent of the plaintiff, caused the note to be presented and proved

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in their names, though this might be sufficient to bar them of all other and independent remedies in respect to the note, it will not effect the rights of the plaintiff; for the factors cannot by virtue of their *lien* for commission, put the plaintiff's interest in manifest jeopardy by resorting without necessity to an unusual course, at least until they have given him notice of the *lien* and an opportunity to discharge it.

ASSUMPSIT on a promissory note, and submitted to the court upon the following statement of facts, as agreed to by the parties: "The plaintiff, at and before the time of giving the note in question, and was, and ever since has been, a merchant domiciled and doing business in Jericho, Vermont, and as such consigned country produce of his, to Messrs. Jewell, Harrison & Co., commission merchants, residing and doing business as such, in the city of New-York, to sell on commission without guaranty, at a commission of two-and-a-half per cent.

"That the defendant Green, then in partnership with John E. Short, under the firm of Edward H. Green & Co., both residing and doing business in the city of Boston, Massachusetts, being in the city of New York, purchased a quantity of the plaintiff's produce, so consigned, of said consignees, and executed and delivered to said consignees the note in question, which was in the words following:

"NEW YORK, January 10, 1846.

'Sixty days after date, we promise to pay to the order of ourselves, at the counting-room of Jewell, Harrison & Co., N. Y., four hundred and thirty dollars and forty-three cents, value received.'

(Signed,) 'Edward H. Green & Co.'

On the back of which is indorsed, 'Edward H. Green & Co.' and also 'March 10, 1846.'

'Proved,' 'E. G. L.'

"That this sale and taking of the said note was without the plaintiff's knowledge. That shortly after, and before the note fell due, and while it remained in the hands of said consignees, the said defendants stopped payment, and certain proceedings were had by them under the insolvent laws of Massachusetts, by means of which they obtained a discharge in due form, (which was made a part of the case.) That while such proceedings were being had in Massachusetts, the said Jewell, Harrison & Co., without the knowledge of the plaintiff, and of their own mere motion, sent said note to Boston for allowance, by the commissioners of insol-

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vency, with a view to entitle the note to a share of the assets of the defendants. That the said note was proved and allowed before said commissioners, in favor of Jewell, Harrison & Co. That the plaintiff was wholly ignorant of all this, until long after, but was informed of the fact at the time he received said note from said Jewell, Harrison & Co. That the contract which the note was given for, and the note, were both made in said New York, and the residences of all the parties have remained as at that time.

It was further agreed:

That at the time of the sale of the property to the defendants, the said consignees did not communicate to them, that the property belonged to the plaintiff, nor did the defendants know who was the real owner of the property, but simply contracted with said Jewell, Harrison & Co., knowing them to be commission merchants, without any inquiries as to the true ownership of the property. No dividend has yet been declared or made upon said note, or any of the claims proved. And the plaintiff has never received anything thereon, or attempted to avail himself of any such proof or allowance of said note, except as above stated. Nor has he ever disclaimed or disowned to the defendants or the commissioners of insolvency, the act of said Jewell, Harrison & Co., in procuring said note to be proved and allowed as aforesaid, in any other manner than bringing this suit on said note.

The said Jewell, Harrison & Co. had authority from the plaintiff to sell said produce to the best advantage, such being the instructions from the plaintiff.

Certified copies of proceedings and discharges under the insolvent laws of Massachusetts, were made part of the case.

September Term of the County Court, A. D. 1849,—BENNETT, J., presiding, rendered judgment for the plaintiff. Exceptions by the defendants.

S. Wires and W. W. Peck for defendants.

1. If the plaintiff had proved the claim, he would have been barred. The act would have been a waiver of his *extra-territorial immunity*. Story Confl. Laws, § 335–351.

Phillips v. *Allen*, 8 B. & C. 477. *Sill* v. *Warwic*, 1 H. Bl. 665. *Phillips* v. *Hunter*, 2 H. Bl. 403–414. *Mayhew* v. *Thatcher*, 6 Whea. 129. *Hoxie* v. *Wright*, 2 Vt., 263. *Sturgis* v. *Crown-*

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ingshield, 4 Whea. 122. *McMillen* v. *McNiel*, 4 Whea. 209. *Ogden* v. *Saunders*, 12 Whea.

2. The proof by Jewell, Harrison & Co., was the act of the plaintiff. As factors and owners of a special interest in the note, they might prove the claim. Story on Ag. § 393, 394, 227, 228. *Parker* v. *B*—— 22 Pick.

3. The plaintiff has an allowance — a right to a dividend, and should one be made, he cannot retain that and recover judgment. Hence he must be treated as having ratified the *proof*.

Kasson & Edmunds and *A. Peck* for the plaintiff.

1. It is well settled that the insolvent laws of a State cannot operate extra-territorially, or upon the rights of citizens of other States, where the contract was not made, or to be performed in the State passing such laws.

Proctor v. *Moore*, 1 Mass. 199. *Baker* v. *Wheaton*, 5 id. 511. *Watson* v. *Bowen*, 10 id. 337. *Blanchard* v. *Russell*, 13 id. 1. *Walsh* v. *Farrand*, 13 id. 19. *Bradford* v. *Farrand*, 13 id. 18. *Van Raugh* v. *Van Arsdaln*, 3 Caine, 154. *Smith* v. *Smith*, 2 J. R. 241. *Brainard* v. *Marshall*, 8 Pick. 195. *Ogden* v. *Saunders*, A. U. S. Cond. 533–5.

2. Nor can a case be found where a creditor waives his extra-territorial immunity by any act short of not only proving his claim, but *accepting* a dividend under the commission. Such was the case of *Clay* v. *Smith*, 5 Pet. 411. And in *Kimberly* v. *Ely*, 6 Pick. 440, the court held, that even though the creditor appeared and took a dividend under the laws of another State, which were unconstitutional, it was no bar.

3. The commission merchants or factors in New York, were not authorized to present the claim, or submit it to arbitration, or to commute it, or to do anything else, except to receive the money upon it, and the whole of it, or to do any act to impair the security of the plaintiff.

Story on Agn. § 403, 413, 446. —— v. *Leigh*, 4 Campb. 194.

The opinion of the court was delivered by

Royce, Ch. J. The note in suit was neither executed nor payable in Massachusetts, nor did the plaintiff or his factors, Jewell, Harrison & Co., reside there. And from these facts, it follows,

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that upon principles long settled and universally acknowledged, the insolvent laws of Massachusetts could have no operation upon the rights of the plaintiff or his factors, without their express or implied consent.

We proceed to inquire, then, whether such consent was given to the proceedings in Massachusetts, as will bar a subsequent action on the note. And the question may first be considered in reference to Jewell, Harrison & Co. It is claimed by the plaintiff, that the proof of the note under the commission of insolvency, was not alone sufficient to produce this effect; but that the further act of accepting a dividend would be necessary. I am not aware that any case of a foreign creditor has been made to turn upon the necessity of this latter fact, although the fact appeared in *Clay* v. *Smith*, 5 Pet. 411, where such a creditor was adjudged to be barred. In *Kimberly* v. *Ely*, 6 Pick. 440, the creditor had proved his debt, and received a dividend, but the statute under which the proceedings were had, was held to be unconstitutional in reference to his debt; so that the dividend only operated as payment *pro-tanto*. Chancellor Kent lays down the proposition, citing many authorities to support it, that "The discharge under a State law will not discharge a debt due to a citizen of another State, who does not make himself a party to a proceeding under this law." 2 Kent 393. But every one who presents and proves his debts, under a commission of this kind, does become such a party; and in a way, moreover, which carries the strongest implication of his full consent and intended acquiescence. And since Jewell, Harrison & Co., not only caused this note to be presented and proved in their name, but have suffered the proof to remain uncancelled; we are disposed to consider the participation of those persons in the proceedings, as being sufficient to bar them of all other and independent remedies in respect of the note. And it only remains to be determined, whether the plaintiff is also concluded by their act.

The case shows that, at the time of making the purchase of Jewell, Harrison & Co., the defendant knew he was dealing with commission merchants, or factors. He had reason to conclude, therefore, that they were not the owners of the property which he purchased, though he was not informed to whom it belonged. And this may have suggested the peculiar form in which the note was drawn,—being made payable to the order of the signers; so that

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by means of an endorsement in blank, the legal property of the note might rest in the real vender, instead of the factors. The endorsement was simultaneous with the signing of the note, and was essential to render the instrument operative as a contract. Under such circumstances, I regard it in effect, as a note to the plaintiff. His property furnished the consideration of the note, and he could, by indisputable right, have filled up the indorsement to himself. Had Jewell, Harrison & Co. become bankrupts or insolvents, this note could not have been treated as a part of their assets. *Scott et al.*, v. *Surman et al.* Willes 400. 2 Kent, 623, and cases there cited. It was the plaintiff's property on which the factors had, at most, but a trifling lien for their commission. And hence, the question arises whether they could in virtue of that lien, or in their character of mere agents, deprive the plaintiff, without his consent or knowledge, of his extra-territorial immunity from the operation of the insolvent laws of Massachusetts, and subject his demand to a species of composition, which might well be expected to prove little better than a sacrifice of the debt. Such an act is certainly not within the ordinary powers of a commercial agent. On the contrary, the general rule is, that without special authority, he cannot even compound a debt. Paley Ag. 291. The powers properly appertaining to their employment as factors, would have enabled Jewell, Harrison & Co. to use all available means for enforcing payment of the debt. They might have commenced and prosecuted a suit for its collection, even in Massachusetts, if found to be necessary. And perhaps their lien for commission may have given them a paramount right to control the demand. But even that could not entitle them to put the plaintiff's interest in manifest jeopardy, by resorting without necessity to an unusual course, at least, until they had given him notice of the lien, and an opportunity to discharge it. In view of all the facts disclosed by the case, we consider that the right of the plaintiff to sustain the present action is not affected by the proceedings in Massachusetts.

Judgment affirmed.

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Luther P. Blodgett v. Charles Adams.

Officer, the interest he acquires in property by attachment. Bailment. Demand. Exceptions.

An officer acquires a special property in the goods or chattels, by attaching them in a manner authorized by Statute; and by the same means he also acquires a sufficient possession, to enable him to support trespass or trover for any wrongful taking or conversion of the property.

And the action can as well be sustained against the defendant in the attachment, as against a stranger.

The Statute does not imply a bailment of the property so attached from the officer to the defendant in the process; and such defendant can only interfere, by express permission of the officer, or to secure the safety and preservation of the property.

When an attachment is made by one officer, and the execution is delivered to an other, in order to perfect the lien, the creditors are not only bound to place their execution in the hands of a proper officer within thirty days from the recovery of judgment, but cause the property to be demanded of the officer making the attachment within that period, by the officer holding the execution.

A case brought into the Supreme Court on exceptions, is heard and decided as if it were pending upon a writ of error.

Trover, for a quantity of hay, corn, rye, oats and wood. Plea, general issue and trial by the court.

The plaintiff proved, that as sheriff of Chittenden County, on the fifth day of September, 1848, he attached, as the property of the defendant, by virtue of a writ of attachment, in favor of Strong, Doolittle & Co., "all the hay and grain situated in Burlington, in "the barns on the farm or farms of land owned or occupied by "said defendant in Burlington, and left a copy of," &c., &c., that the writ was returned and a judgment thereon, and execution issued, on which the sheriff, E. D. Mason, made return that, "on "diligent search throughout his precinct he could not find either "the goods, chattels or estate of the defendant."

Also introduced evidence tending to show, that at the time of the attachment, among other things, the defendant had a quantity of hay, of more than fifty tons, and that during the subsequent winter it was mostly if not all fed out under his direction, to his stock.

Upon this evidence the defendant insisted that the plaintiff was

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not entitled to a judgment for the amount of the judgment of *Strong, Doolittle & Co.* v. *Adams.* The defendant also insisted, among other things, that as the plaintiff's claim was that of a special owner against the general owner, and at most was but a lien for the security of the demand, in the original attachment of Strong, Doolittle & Co., that in order to perfect that lien, the officer having the execution must make demand of the property attached, or of the money, and probably of both; but the court rendered judgment for the plaintiff, for the amount of the judgment of Strong, Doolittle & Co., and the interest.

The court found from the evidence, that the value of the hay attached and fed out by the defendant, as before stated, much exceeded the amount due on said judgment of Strong, Doolittle & Co., against the defendant. To all which the defendant excepted.

The defendant, *per se.*

A new trial in this case will be granted, because the goods attached were not legally charged in execution, and the *lien* is lost. The attachment was made by plaintiff Blodgett, but the execution was delivered to his successor, E. D. Mason, and no demand made of any one. *Enos* v. *Brown*, 1 D. Chip. 280. *Clark* v. *Washburn*, 9 Vt. R. 302. *Ayer* v. *Jameson*, 9 Vt. R. 363.

This action could not be maintained without a demand upon the defendant for the goods or the money.

Goods attached, and in the custody of the owner, by the consent or license of the officer, are the subjects of contract, but not of tort.

The want of a demand is not excused by attempting to show a conversion, for in all cases the use is a lawful act in the owner, and if on demand, he has *like goods*, or the money to satisfy the *lien*, the implied undertaking on his part is performed.

L. E. Chittenden and *E. J. Phelps* for plaintiff.

The destruction of the attached property by the defendant, was an unlawful conversion. In such case no demand is necessary in order to sustain trover.

No other point is presented by the bill of exceptions, which does not profess to set forth all the facts upon which the plaintiff recovered, but only such as are necessary to present this question, being the only one raised at the trial.

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The opinion of the court was delivered by

ROYCE, Ch. J. The case involves no question to be considered, except in relation to the hay sued for, though other property was also embraced in the declaration. The plaintiff acquired a special property in the hay, by attaching it in a manner authorized by statute. By the same means he also acquired a sufficient possession to enable him to support trespass or trover for any wrongful taking or conversion of it. *Lowrey* v. *Walker*, 4 Vt. 76, S. C. 5 Vt. And the action can as well be sustained against the defendant in the attachment, as against a stranger. The statute does not imply a bailment of property so attached, from the officer to the defendant, in the process. Such defendant can only interfere by express permission of the officer, or to secure the safety and preservation of the property. And hence, we cannot accede to the proposition urged in argument,—that a demand upon the defendant was requisite to perfect the cause of action. He was not connected by any privity of contract with the plaintiff's right, but must be taken to have acted in open disregard and violation of it.

But the defendant being the general owner, whose right to control and use this property would at once become absolute upon a dissolution of the lien created by the attachment, he could not be ultimately subjected on account of the property, except in the event that the lien should be perfected. The property must have been "taken in execution," within the meaning of the statute, and the plaintiff fixed with an absolute liability in favor of the attaching creditors. And in order to effect this after the plaintiff had ceased to be sheriff, the creditors were bound, not only to place their execution in the hands of a proper officer within thirty days from the recovery of judgment, but to cause the property to be demanded of the plaintiff, within that period, by the officer holding the execution. *Enos* v. *Brown*, 1 D. Ch. 280, *Bliss* v. *Stevens*, 4 Vt. 88. *Ayer* v. *Jameson*, 9 Vt. 363.

We have only to determine, then, how the case is to be understood and treated, with reference to proof at the trial, of this necessary demand upon the plaintiff. A case brought into this court on exceptions, is heard and decided as if it were pending upon a writ of error. And unless sufficient appears in the bill of exceptions to convince the court that error has been committed, the judgment excepted to, is of course to be affirmed. Error is

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not to be conjectured for the purpose of reversing a judgment. In accordance with this rule, when the evidence detailed or referred to, is not certified to have been all the evidence upon a point, we frequently presume that other and sufficient evidence was given. But when the more rational and probable inference is, that the case presents the very state of facts or evidence on which the decision was based, such inference will not be controlled by any counter presumption in aid of the decision. And if a case should happen to be so drawn up and allowed, as to furnish such an inference contrary to the true state of the evidence on trial, the proper course would require an amendment of the case before a hearing on the exceptions.

It is stated in the present case, that when the plaintiff had shown his attachment of the hay,—the recovery of judgment by the attaching creditors,—the delivery of their execution to the new sheriff in season to hold the property attached,—and a general return of *nulla bona* by that officer upon the execution;—the defendant insisted that, "on this evidence, the plaintiff was not entitled to a judgment for the amount of the judgment of Strong, Doolittle & Co. against Adams;"—and that in order to perfect the lien by attachment, "the officer having the execution must make demand of the property attached, or of the money, and probably of both." The case proceeds immediately to say,—"But the court rendered judgment for the plaintiff, for the amount of the judgment of Strong, Doolittle & Co., and the interest;" that amount being less than the value of the hay taken and used by the defendant. Now it is possible that distinct evidence may have been given at the trial, to prove a demand upon the plaintiff. But we think the case, upon the most natural and obvious construction to be given to it, excludes the presumption of any such evidence. It is therefore to be taken, that the right to recover was adjudged to be established, with no other evidence to prove the demand, than such as the return upon the execution may have been supposed to afford. That return imports a general search for the debtor's property, but furnishes no evidence, as we consider, of the special demand upon the plaintiff, which was indispensable. The judgment below must be reversed, and the cause remanded for another trial.

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Horace Ferris v. Joseph Smith.

Deputy Sheriff, in an action upon a receipt for property attached, a competent witness to prove seasonable demand of the property. What constitutes a record of his deputation.

In an action upon a receipt for property attached, a deputy sheriff, to whom the execution was delivered, is a competent witness to testify that he made a seasonable demand of the property of the officer who made the attachment, and of the receiptor of the property so attached.

Where a deputy sheriff, on the first day of December, 1847, took the oath of office, and left his deputation and oath with the County Clerk for record, and paid the Clerk for recording the same, and it remained in the County Clerk's office until the August following, and the Clerk then recorded it upon a book in his office. *Held*, that though the record was perfected at a subsequent time, constructively it must be deemed to exist from the time the instrument was lodged for record, and that the officer was authorized to act as a deputy sheriff, and had competent authority to act as such, from the time he so left his deputation *bona fide* for record.

This was an action of

Trover for personal property. Plea, the general issue and trial by jury.

The plaintiff gave in evidence an officer's receipt, executed by the defendant to the plaintiff for the property described in the declaration, and also the record of a suit and judgment, in Chittenden County Court, in favor of J. & J. H. Peck & Co. against one Benjamin Wells, recovered at the September term, 1847, of said court, for the sum of $167,80 damages and costs, and proved that the property in question was attached by the plaintiff, as sheriff of Chittenden County, on the writ in said suit, as the property of the said Wells to whom it belonged, and was receipted by the defendant, as above stated, and that within thirty days after the rendition of said judgment, the plaintiff therein, took out an execution thereon, in due form of law, and placed the same, within the thirty days, in the hands of L. P. Blodgett, then sheriff of said county, for collection, by whom it was received; and he handed it for collection to one J. C. Griffin, then acting as deputy sheriff under said Blodgett. The plaintiff then called said Griffin, as a witness, to prove a demand upon the plaintiff and defendant, of the property in question, upon the receipt and execution within thirty days from the rendition of said judgment.

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The defendant objected to the testimony of the said Griffin, upon the ground of interest, as he was the person to make the demand. The court overruled the objection and admitted the testimony, no facts appearing to show him in interest.

The testimony of the said Griffin proved, that after receiving the said execution from the said Blodgett as aforesaid, and within thirty days after the rendition of said judgment, he called at the house of the plaintiff for the purpose of making a demand upon the plaintiff for said property, but found the plaintiff absent from home. That two days after, he received the said receipt by mail, enclosed in a letter from the son of the plaintiff, and afterwards, within thirty days from the rendition of said judgment, and on the third day of January, 1848, he made a demand of the property in question, on the receipt from the defendant, who failed and refused to deliver any part of it, alledging as a reason, that he had none of it in his possession, it having been taken away and disposed of by the said Wells. And that after such demand upon the defendant, and within the thirty days after the rendition of said judgment, the said Griffin demanded the property of the plaintiff, who likewise failed and refused to deliver it. It also appeared that the said execution was duly returned by the said Griffin within its lifetime, unsatisfied, except for the sum of $25,16 indorsed thereon, being the proceeds of certain other property. And that in holding and returning said execution, and making said demands, said Griffin acted as deputy sheriff under said Blodgett.

The defendant then proved, that at the time of the execution of said receipt, the whole of said property went back into the possession of said Wells, and was disposed of by him, and that the said defendant never afterwards had possession of any part of it, that during the time when said Griffin held said execution, and made said demands upon the plaintiff and defendant for said property, as aforesaid, neither the deputation nor oath of office of said Griffin, as deputy sheriff under said Blodgett for that year, had been recorded in the County Clerk's office, or by the County Clerk of said County of Chittenden, that the same were not so recorded until sometime in the August following, though said deputation had been made out and was in said Clerk's office in August, 1848; that no minute was made on said deputation, by said Clerk or otherwise, of the same being left for record, nor was any other minute

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made thereon, except the words "*Fees paid*," previous to August, 1848.

The plaintiff recalled the said J. C. Griffin, who testified that said deputation was made out and the oath of office taken, on the first day of December, 1847, (being the day of said Griffin's appointment as deputy sheriff as aforesaid,) that said deputation was on that day left by said Griffin with said clerk, for the purpose of being recorded, and with instructions to record it, that the fees for recording the same were paid by him, and that said deputation had remained in said office ever since. The defendant objected to the foregoing testimony of the said Griffin on the ground of interest. The court overruled the objection.

Upon the foregoing facts, the court held *pro forma*, that the plaintiff was entitled to recover, and a verdict for the plaintiff was taken. Exceptions by the defendant.

D. A. Smalley for defendant.

This case presents three questions for the decision of this Court.

1. Was Griffin legal deputy sheriff when he received the execution from Blodgett, and demanded the property of plaintiff and of the defendant.

The statute is imperative that the deputy "before he proceeds "to act, shall cause to be recorded his deputation and certificate of "his oath of office," and unless he does so, "his official acts shall "not be valid." Comp. Laws, Page 97, Sec. 5.

The leaving of the deputation with the clerk, and paying the fees, can in no sense be regarded as a compliance with the statute.

The matter is one of mere statutory regulation, and in all analagous cases, the courts in this State have held, that the leaving the paper with the recording officer, and his filing it "received for record," was insufficient where the statute required a record to give it validity. *Burton* v. *Pond*, 5 Day, 160. *Carpenter* v. *Sawyer et al.*, 17 Vt. 121. *Morton & Clark* v. *Edwin*, 19 Vt. 77.

In this case no record was made from 1st December to August; and if Griffin could legally act during all that time, it is not *necessary* that a record should ever be made.

2. If Griffin was not a legal deputy sheriff, he had no authority to collect the execution. He could not levy it on any property —nor had he any authority to demand payment upon it or dis-

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charge it. His demand upon the plaintiff and defendant was nugatory. He has no authority to receive the property or dispose of it, to satisfy the debt. There is no pretence that he was acting as the mere private agent of Blodgett, the sheriff. He was acting entirely in his supposed official capacity, and if that fails, he was acting without authority. *Bliss* v. *Stevens*, 4 *Vt.* 88. *Allen* v. *Carty*, 19 *Vt.* 65. *Chadwick & Co.* v. *Divoll*, 12 *Vt.* 499.

3. The witness, Griffin, by whom the plaintiff proves the facts relied upon as a recording of the deputation, was clearly interested. It was his duty to cause the proper record to be made. If he had not done so, he was liable for the loss sustained by the consequent failure of this suit.

A judgment for the plaintiff would *bar* that liability, and be conclusive evidence in his favor;—and that judgment was obtained solely upon his testimony.

S. Wires and *W. W. Peck* for plaintiff.

1. Griffin, by leaving his deputation and the certificate of his oath of office in the County Clerk's office, with the County Clerk, with instructions to record them, and the recording fees; and the latter having received them for that purpose, "caused the deputation and certificate to be recorded" within the Statute, (Comp. Statutes, ch. 13, sec. 5;) and became thereby an *officer de jure*. *Marbury* v. *Madison*, 1 Cranch. 137, 154 and 161. *Evans* v. *Thomas*, 2 Strange 833. *Jones* v. *Randall*, Cowp. 17. *Beals* v. *Langstaff*, 2 Wils. 317. *Baldwin* v. *Prouty*, 13 Johns. 430. *Blood* v. *Morrill*, 17 Vt. R. 598.

2. If Griffin was not an officer *de jure*, he was one *de facto*, and his acts under the execution were valid as to these parties. —— v. ——, 3 Barn. & Ald. 266. *People* v. *Collins*, 7 Johns. 549. *People* v. *White*, 24 Wen. 525. *People* v. *Stevens*, 5 Hill, 629. *People* v. *Hopson*, 1 Denio. 574. *Tucker* v. *Aiken*, 7 N. Hamp. 131. *Gregor* v. *Balch*, 14 Vt. R. 428.

3. If Griffin's acts cannot be treated as valid, as those of an officer, he may be considered as the servant of the sheriff Blodgett, and his acts as those of the sheriff in making the demand under the execution and receipt.

The opinion of the court was delivered by

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ROYCE, Ch. J. Whether trover is a proper form of action upon the facts of this case, has not been made a question in the argument. That it would lay against Wells, the debtor, for his actual disposition of the property, cannot be doubted. And it is probably a legitimate conclusion from authority, that if the plaintiff had a right to recover in any form of action, against this defendant, he was at liberty to elect between trover for the property, and assumpsit upon the defendant's receipt:—that the surrender of the property to Wells being unauthorized by the plaintiff, and made at the defendant's risk, the conversion of it which ensued was properly chargeable upon him.

The objection to the competency of Griffin as a witness for the plaintiff, is answered by the case of *Allen* v. *Carty et al.*, 19 Vt. 65.

The important question in the case, is, whether Griffin had authority to demand the property. In making the demand upon the defendant, Griffin could doubtless be regarded as the plaintiff's agent for that purpose. The plaintiff, or those acting for him in his absence, sent the defendant's receipt to Griffin, expressly to enable him to pursue and demand the property upon it. By the terms of that receipt the defendant had undertaken to return the property to the plaintiff, or the bearer of the receipt, on demand. The plaintiff was not bound to await the issuing of execution or the recovery of judgment, by the attaching creditors against Wells, but could lawfully demand a return of the property at any time. And as he could do this without legal process, so he could make the demand in person, or by any private agent entrusted with the receipt for the purpose of making it. It is true that Griffin professed to act in the matter as deputy sheriff; but if he had not the authority of that office, the law would sooner refer his act to another right or capacity which might render it effectual, than suffer it to be unavailing and nugatory.

And perhaps upon similar considerations the demand upon the plaintiff could also be sustained, by treating Griffin as having made it in the character of a mere agent or servant of Blodgett, the sheriff. But the argument has been mainly directed to the question of Griffin's authority as a deputy sheriff; and we think the validity of the demand (on the plaintiff especially,) more properly depends upon that question.

As he had been appointed to the office, and had for some time

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assumed to discharge the duties of it, he would on common principles, be regarded as at least an officer *de facto*, whose acts would be valid as between these parties. *Rex* v. *Lisle*, 2 Str. 1090. *McGregor* v. *Balch*, 14 Vt. 428. By the statute, however, it is not enough that a sheriff's deputy be appointed, commissioned and sworn ;— another requisite is added,— that before he proceeds to act, he cause to be recorded his deputation and the certificate of his oath of office. Until this is done, it is expressly enacted that "his official acts shall not be valid." And to hold that without a compliance with this requisition, the official acts of the deputy are available between third persons, as being those of an officer *de facto*, would be to annul this enactment in a great majority of the cases to which its terms are applicable. We must therefore regard the enactment as having been purposely interposed in the case of a deputy sheriff thus situated, to prevent any such construction in support of his acts in that character.

It remains to be determined whether the deputation and certificate were seasonably recorded. For the defendant it is claimed, that nothing short of a full enrollment in the County Clerk's book of records could have any effect under the statute. The plaintiff insists, that by lodging the papers in the office of the clerk to be recorded, and paying the fees for recording, Griffin became qualified to act officially ; and that the record afterwards made, took effect by relation from the time of so lodging the papers for record. The distinction is between those cases where the record is made essential in working a transmission of title, or in creating or defeating a right, and those where it is required for the purpose of public notice. In cases of the former class,— as the levy of an execution upon real estate, nothing is effectually accomplished, until the necessary records are completed. *Morton & Clark* v. *Edwin*, 19 Vt. 77. But in those of the latter class, where the title is passed, or the right acquired, by act of the parties, as in the conveyance of real estate by deed, though a record is necessary, in order to give full effect to the transaction for collateral purposes, it is made so as the medium of general notice. And as a public recording office is a place where all persons have the right to apply for information, as well in regard to instruments lodged there for record, as to the records already made, the act of a party in lodging the evidence of his title in such an office, for the *bona fide*

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purpose of having it recorded without delay, and the reception of it by the recording officer for the same purpose, are held to operate like the record itself, as notice to third persons. In other words, the deed or instrument thus deposited and received, is deemed to be of record, or recorded. *Marbury* v. *Madison*, 1 U. S. Cond. R. 273–4. This is on condition, to be sure, that a full and proper record be ultimately made, and that the party shall in no way interfere to prevent or delay the making it. *Sawyer & Rogers* v. *Adams*, 8 Vt. 172. Now it is certain that Griffin became fully invested with his office by the concurrent acts of the sheriff and himself. *Marbury* v. *Madison*, *ut supra*. The record enjoined by statute had no efficacy in creating or conferring it. And the only object of the statutory provision was, to furnish to the public timely and incontestable evidence or notice of his appointment and authority to act. The reasons for the enactment with such a purpose in view, are strong and obvious; for it deeply concerns the public to know who are empowered to act as executive officers, and for whose acts in such a capacity the sheriff of the county is responsible. But notice being the whole object of the requirement, we consider that this case is evidently to be ranked in the second class before mentioned, where the record, though perfected at a subsequent period, is constructively deemed to exist from the time of lodging the instrument for record. It follows, that at the time of demanding the property in this instance, Griffin was authorized to act as a deputy sheriff, and had competent authority to make the demand.

Judgment of the county court affirmed.

RUTLAND & BURLINGTON R. R. CO. *v.* MORTON COLE.

Promissory note. Beneficially interested, can sue. Parol evidence. Declaration.

It is now regarded as settled law in this State, that a person beneficially interested in a simple contract, or in a promissory note, may sue and sustain an action in his own name, upon the same.

And where C., for assessments upon stock in the Rutland & Burlington R. R. Co.,

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gave his note, "for value received payable to the order of Samuel Henshaw, treasurer, &c." It was held, that the plaintiffs might, by parol evidence, show that they are the persons from whom the consideration moved, and to whom the note was in fact given.

And it was also held, that an action might be sustained upon the note in the name of the Corporation.

And it was also held, that in declaring upon the note, it was not necessary for the plaintiffs to alledge in their declaration, that the note was made payable to them, by the name of their treasurer.

ASSUMPSIT upon a promissory note. Plea, the general issue, and trial by the court, September Term, 1851,—POLAND, J., presiding.

On trial, the plaintiffs gave in evidence the note declared upon, signed by the defendant, and dated, October 15, 1849, and which was in these words,—"Three months after date, for value received I promise to pay to the order of Samuel Henshaw, treasurer, &c. three hundred dollars, at the Farmers and Mechanics Bank, with interest." The plaintiffs also proved that Samuel Henshaw was treasurer of said corporation, and that said note was given for assessments upon shares, in said company, owned by the defendant, and that the said company had been accustomed to take notes payable to the treasurer, for assessments on the stock.

The defendant objected to the evidence to prove the facts above stated, also to the note, and insisted that the plaintiffs could not recover. 1. Because there is a variance between the note and the declaration. 2. That the action could not be sustained, in the name of the plaintiffs, on said note.

The court overruled the objections, and rendered judgment for the plaintiffs to recover the amount of said note. Exceptions by defendant.

Peck & Bailey for defendant.

The action is improperly brought and cannot be sustained in the name of the plaintiffs — the legal interest being in Henshaw — on the face of the note the addition of the word treasurer to the name of the person does not vary the construction of the note, as it does not appear of what person, company, or corporation he is treasurer; therefore, Henshaw, and Henshaw alone can sue, and

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parol testimony tending to show the interest in the plaintiffs, was improperly admitted.

It is a well established principle of commercial law, that the legal interest in promissory notes and bills of exchange is, in the party appearing on the face of the instrument, and consequently in him the sole right to sue.

The general current of authorities is, that where the principal and agent are both named in the instrument, the action must be in the name of the agent, and the cases are uniform in England and in the several states, that where the agent is named with the simple addition of his agency, trust, or office, and the principal not named, the action can be brought only in the name of the agent or person named in the body of the instrument, and the principal cannot be introduced as a party by parol evidence. Contracts under seal, bills of exchange and promissory notes are subject to this rule, while in simple contracts, made by or in the name of an agent, a different rule in some cases applies when the principal is discovered. It is important that in cases of negotiable paper the parties should appear upon the face of the instrument. *Cramlington* v. *Evans*, 1 Shower R. 4. 2 Ventris, 307. *Barker* v. *Mech. Ins. Co.*, 3 Wendall R. 94. *Van Ness* v. *Forrest*, 8 Cranch, 30. *Hills* v. *Bannister*, 8 Cowen R. 31. *Hunt* v. *Van Alstyene*, 25 Wend. R. 601. *Buffum* v. *Chadwick*, 8 Mass. R. 103. *Bank U. S.* v. *Lyman & Etal*, 20 Vt. R. 666. *Vt. Cen. R. R. Co.* v. *Clayes*, 21 Vt. R. 30.

In the case of *Manchester* v. *Slason*, 13 Vt. 334, the note upon which the suit was brought was payable to the order of the defendant, (Slason) and by the defendant indorsed in blank to the plaintiffs and filled up—"pay to M. Clark, Esq., Cashier,"—and the court held the action well brought in the name of the Bank citing in support of their opinion; the case of *Farmers & Mechanics Bank* v. *Day*, 13 Vt. 36, in which the point does not seem to have been raised. The note having been indorsed to the plaintiffs in blank, and thus the property in the note in them, it was competent for them to fill up the indorsement to themselves, or having filled it up, to the Cashier to strike out this part of the indorsement and fill it up to the Bank.

There is a distinction between indorsements which may be stricken out and filled up on trial, according to the fact and cases arising upon the face of the note or bill.

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In *Middlebury* v. *Case*, 6 Vt. 165, the note was given to the selectmen of the town and it was there decided, that the action was rightly brought in the name of the town. The court put the case upon the ground that the Statute of 1817, gave the right of action to the town, and by force of this Statute the action was rightly brought in its name. Nor does it appear that the selectmen were named in the note, except by their office.

The earliest case upon this subject in this State, is the case of *Arlington* v. *Hinds*, 1 D. Chip. 431. This it must be admitted, is no authority for this case at bar, differing from it, as it does in three very important respects.

1. The note in this last case was payable to "Luther Stone, town treasurer, or his successors in office." By the Statute of 1817, all actions given by law to certain officers of town, among which is the treasurer, were to be brought in the name of the town.

2. The court proceeded upon the ground that at that time the law merchant was not in force in this State as applicable to promissory notes, but that they stood upon the same basis as simple contracts, concerning which contracts, promising none of the negotiable character that belongs to promissory notes, a different rule has been applied. The difference in the rule obviously depending upon the different character of the instrument, but it has been subsequently decided in this State, that the law merchant is applicable to promissory notes.

3. The court proceeded upon the ground that the note being dated at *Arlington*, and payable to "Luther Stone, town treasurer, or his successors in office," it thereby indicated the town of which Stone was treasurer, and thus disclosed the name of the *principal*, and that it was the same as if it had been payable in terms to Luther Stone, town treasurer of *Arlington*, and thus the legal interest upon the face of the note in the town of Arlington.

Even if parol evidence is in any case admissible, it cannot in this case, vary or control the note. If an individual or firm are in the practice of taking notes in the name of a clerk, it can be sued only in the name of such clerk, and it makes no difference that the word *clerk* is added to the name of such paper. The parol evidence in this case only shows that it is not a case of a misnomer, as it shows the note was so taken by design and payable to a real party.

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There is a variance between the declaration and the note offered in support of it. The note is payable to Samuel Henshaw, and the declaration declares upon the note payable to the Rutland and Burlington Rail Road Company. If an action can be sustained in the name of the plaintiffs it can only be by declaring on the note as payable to Rutland and Burlington Rail Road Company, by the name of Samuel Henshaw, treasurer, treating it as a misnomer, but the evidence shows it is not a case of misnomer, as the note was taken payable, by design, to the plaintiffs, and by their direction.

D. A. Smalley for plaintiffs.

The plaintiffs' right to recover is resisted on the ground, the corporation is not a party to the contract, and cannot maintain the action.

This case is not distinguishable in principle from the previous decisions of the Supreme Court of this State in the cases of *Arlington* v. *Hinds*, 1 D. Chip. Rep. 431. *Whitelaw, Treasurer of Passumpsic Turnpike Co.* v. *Cahoon*, 1 D. Ch. 295. *Farmers & Mechanics Bank* v. *Day*, 13 Vt. 36, and *Bank of Manchester* v. *Slason*, 13 Vt. 334.

In the case of *Arlington* v. *Hinds*, the note was made payable to Luther Stone, town treasurer, or his successors in office,—and it was held that parol evidence was admissible to prove that Stone was treasurer of Arlington, and that the consideration moved from,—and that the action was well brought, in the name of the town. In the case of *Whitelaw, Treasurer, &c.*, CHIPMAN, Ch. J. held that the treasurer of the corporation could not maintain an action in his own name, on a contract made in the name of such treasurer,—but must be brought by the Company in their corporate name. The case of the *Farmers & Mechanics Bank* v. *Day*, was an action of assumpsit upon a bill of exchange, indorsed by defendant Day to "C. F. Warner, Cashier, or order." Parol evidence was admitted by the court, to show that Warner was cashier of the bank, and that the action was properly brought by the corporation. And the case of the *Bank of Manchester* v. *Slason*, was also an action of assumpsit on a bill of exchange, indorsed in blank, and filled up thus:—"pay to M. Clark, Esq., Cashier." Parol evidence was admitted to show that Clark was

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cashier of the bank, that it was the uniform mode of indorsing paper to banks.

Henshaw was a mere agent of the corporation and had no beneficial interest in the note. The consideration moved from the company to the defendant, and he knew at the time that he was not dealing with Henshaw in individual capacity. The defendant being a member of the corporation was bound to know their custom of taking notes.

In the case of the *Vt. C. R. R. Co.* v. *Clayes*, 21 Vt. Rep. 12, 30, the same principle adjudged in the above cases was recognized by the court.

The defendant relies upon the case of the *U. S. Bank* v. *Lyman et al*, 20 Vt. 666, decided in the Circuit Court of the United States by Judge PRENTISS, wherein it was held that the bank could not recover upon a promissory note, executed by defendants and made payable to "Samuel Jaudon, Esq., Cashier, or order," upon a debt due the plaintiffs, and that Jaudon was their cashier, acting merely as agent for them in taking the note, and had no interest in it whatever.

That case, perhaps, militates against the rule established by the State Court; but the decisions of our own courts which have been so long established and adhered to, should be held conclusive of the rule of the common law of this State.

BY THE COURT. This is an action for a promissory note, made payable to Samuel Henshaw, Treasurer, &c. And upon the trial, the plaintiffs gave parol evidence to show that Henshaw was at the time treasurer of their company, and that the debt for which it was given was theirs. The only question in the case is, whether upon this proof, it is competent for the plaintiffs to maintain the action in their own name.

The very able argument addressed to us on behalf of defendant would abundantly satisfy us, if we had entertained doubts, that by the general commercial law of most countries, where the common law of England prevails, a promissory note, like the present, must be sued in the name of Henshaw. That is the result of the very learned opinion of Justice PRENTISS, in the Circuit Court of the United States in the *Bank of the U. S.* v. *Lyman et al.*, 20 Vt. R.

But in this State, since the case of *Arlington* v. *Hinds*, 1 D.

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Chip., a different rule has prevailed, and has been constantly practiced upon and repeatedly recognized, by the courts of the State, to such an extent as to be regarded as the settled law of the State. This being the case, we should not feel justified in changing the same, by a mere arbitrary determination of this court, unless some important end of justice was thereby to be subserved. And we cannot perceive how it can be of much importance, whether a promissory note, before indorsement, follows the rule of other simple contracts, as to the right of action, or is restrained to that which obtains in the case of specialties. For all practical purposes a promissory note, before it is negotiated, is a simple contract debt, and although it imparts a consideration, it is open to proof, that none in fact existed, which is not the case of a specialty. And if the defendant is allowed to defeat the recovery, by showing that no consideration passed, we see no very serious objections to allowing the plaintiffs, in a case like the present, to show that they are the persons from whom the consideration moved, and to whom the note was in fact given.

From the case of *Binney & Broadhead* v. *Plumley*, 5 Vt. R. 500, I should infer that a suit might also be maintained in the name of the person to whom the note is in terms made payable. But it is clearly settled that the person beneficially interested may sue upon simple contract; and *Arlington* v. *Hinds*, puts promissory notes on the same ground. We do not think it is important to alledge in the declaration, that the note was made payable to the plaintiffs by the name of their treasurer, although that is perhaps the more common form of declaring, and said to be more formal and technical. But certainly not indispensable after judgment, if indeed it would be even upon special demurrer, which I should seriously question. *Bailey* v. *Onondago Ins. Co.*, 6 Hill, 476.

Judgment affirmed.

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William Shepherd v. Jeremiah Beede & Wm. P. Briggs, Trustee.

Book Account. Jurisdiction. Motion to dismiss. Statute.

The Statute, defining and limiting the jurisdiction of the several Courts in this State, in the action of Book Account, has reference to the *debit* side of the book, at the commencement of the suit, and if the court had not jurisdiction at that time, no subsequent act or dealings between the parties, will confer jurisdiction.

Chapter 39, and Sec. 9, of the Compiled Statutes of 1850, directing the Auditor to examine and adjust the accounts of the parties, to the time of making up the report, has reference to cases commenced before a court having jurisdiction of the case at the time the suit is commenced.

If the case is not within the jurisdiction of the court at the time of the commencement of the suit, the same will, on motion, be dismissed in any stage of the proceedings.

Book Account. Judgment to account was rendered in the County Court, and an Auditor was appointed, who reported, with other facts, the following:

The *debit* side of the plaintiff's book, at the time of the commencement of the suit, was less than one hundred dollars. The defendant moved that the action be dismissed, for the reason that the court had no jurisdiction of the same. The County Court, September Term, 1851, Poland, J., presiding, dismissed the action for want of jurisdiction. Exceptions by plaintiff.

A. B. Maynard for plaintiff.

W. P. Briggs for defendant.

The opinion of the court was delivered by

Isham, J. The question in this case arises on a motion to dismiss. The action was on Book Account, and was commenced originally before the County Court. From the report of the Auditor, we ascertain that at the commencement of the suit, the debtor side of the plaintiff's book was less than one hundred dollars. But at the hearing before the Auditor, the account had been increased by the payment of the money charged in the last item of the account. So that the question arises, whether the jurisdiction

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of the court before which the suit is commenced, is to be determined by the state of the account at the commencement of the suit, or at the hearing before the Auditor.

Jurisdiction is given by the Compiled Statutes, 233, Secs. 20 and 21, to Justices of the Peace, in actions on book, when the matter in demand does not exceed one hundred dollars, and this is to be determined by the debtor side of the plaintiff's book. Original jurisdiction is given to the County Court only when it exceeds that amount. When this suit was commenced, the subject matter was exclusively within the jurisdiction of a Justice, and no facts existed that would at that time enable the County Court to entertain jurisdiction of the case. The Statute defining and limiting the jurisdiction of the several courts in this State in this form of action, has reference to the *debit* side of the book at the commencement of the suit, and if the court had not jurisdiction at that time, no subsequent act or dealings between the parties will confer it.

The 9th Sec. of the act, page 290 of the Compiled Statutes, directing the Auditor to examine and adjust the accounts of the parties to the time of making up the report, has reference to cases commenced before a court having jurisdiction of the case; and was intended, either to introduce the same principle which prevails in adjusting accounts before auditors, in the common law action of accounts, or to confer a right which did not exist in other actions, in adjudicating claims that arose after the commencement of the suit. If in this case the *debit* side of the plaintiff's book had exceeded one hundred dollars at the commencement of the suit, the last item of charge could have been adjusted by the Auditor under that provision of the act. But as no claim at that time had accrued, for the money paid, and no right to charge the same on book, existed, it could not enter into any computation in ascertaining the amount of the matter in demand, or the amount of the *debit* side of the plaintiff's book, and should not for that reason have any effect in determining the original jurisdiction of the court before which the suit should be commenced.

The rule applied to other forms of action, has equal application to this. That the subject matter of the suit must be within the jurisdiction of the court at the time of its commencement, or the same will, on motion, be dismissed in any stage of the pro-

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ceedings, as soon as discovered. 3 Vt. Up. 320, *Southwick et al.* v. *Murrill.* 13 Vt. Up. 175, *Stoughton* v. *Mott.*

In the case of *Witherell et al.* v. *Evarts*, 17 Vt. Up. 219, it was held by this court that a suit could not be commenced originally in the county court where the whole account of the plaintiff accrued subsequent to the commencement of the action, and prior to the hearing before the Auditor. And that principle, it would seem must be conclusive in this case. For there is no more right to call upon the defendant *to account before the county court* in this case, than there was in that, *when the suit was commenced*, and if that right did not *then exist*, the action cannot be sustained.

The judgment of the county court must be affirmed.

WILLIAM R. LAWRENCE *v.* LEVERETT B. ENGLESBY.

Orders and Decrees of the Probate Court conclusive, when acting within their jurisdiction. Petition. Pleas in bar.

The orders and decrees of the probate court, when acting within the sphere of their jurisdiction, are as conclusive as the orders and decrees of any other court acting within their jurisdiction; and the Supreme Court cannot, in a collateral manner, review the correctness or propriety of the decrees, or of any matter within the jurisdiction of the probate court.

And upon a petition for the removal of an administrator, for causes that existed to the same extent when the decree was made, as they did at the time the petition was brought,—the administrator pleads the decree of the probate court in bar to the petition, and on demurrer, it was held, that the plea was sufficient.

And also, upon those in interest having neglected and waived an appeal from the decree appointing the administrator, it was held, that the whole matter of the petition had become adjudicated, and all interested thereby concluded.

This was an

APPEAL from the Probate Court. The petition set forth, that one Mary Lawrence died at Burlington, on the 24th day of November, 1850, intestate, and leaving estate to be administered upon; that thirty days next after the death of the said Mary hath not yet elapsed; the petitioner, as matter of right, applies to the

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said court, to be himself appointed administrator of the estate of the said Mary, deceased.

That one Leverett B. Englesby claims to be administrator of the said estate, and that he hath not been legally and properly appointed; that he is not one of the next of kin to said deceased, and that he hath not been recommended to such appointment by the next of kin.

That said Leverett B., is the son of Ebenezer T. Englesby, of said Burlington, who had in his possession and control, for many years past, as trustee of said deceased, a large amount of money, for which said Ebenezer T. Englesby should be called to an account.

That said Leverett B., hath himself, for some time past, been trustee or guardian of the said deceased, and hath had a large amount of money in his hands, for which he, the said Leverett B., ought to account, but hath not. Wherefore, the petition says that said Leverett B. is an improper person to be and have the administration of the estate of the said deceased, &c.

The defendant pleaded three several pleas in bar.

In the first plea, the defendant set forth that his appointment as administrator, was made at the request of Charles Mahoney, Ira E. Lawrence, and David Lawrence; three of the children, heirs, and next of kin of the said Mary, deceased, and that the said Mary had but four children at the time of her decease, and that no appeal was taken from the order of said probate court, so making such appointment of said Englesby administrator as aforesaid, by said William R. Lawrence, or any other person, &c.

The second plea set forth, that said William R. Lawrence has sold, transferred and assigned all claim, right, title and interest, which he, the said William R., had in and to the said estate, real, personal and mixed, to one John Patch, and that said Patch now claims the same, and has notified the said Englesby that he is owner, &c.

The third plea set forth, that said William R. Lawrence is entirely insolvent as to property, and is an unfit person to take charge and have the management of the said estate, &c.

To these pleas, the plaintiff demurred.

The county court, September term, 1851,—POLAND, J., pre-

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siding,—adjudged the said pleas in bar, to be sufficient, and dismissed the petition with costs. Exceptions by the plaintiff.

C. Russell for plaintiff.

1. The petitioner was in law, entitled to the administration of the estate, as one of the next of kin to the intestate, he having made his application within thirty days next after the death of the intestate. Compiled Statutes of 1850, Chapter 50, Sec. 4.

2. The petitioner, to secure his statute rights, was not bound to take an appeal from the order of the probate court appointing the defendant administrator. Such appointment did not take away the petitioner's legal right to the administration of the estate of the deceased. And a grant of administration to the petitioner would of itself have vacated, or superseded the irregular and premature appointment of the defendant.

L. B. Englesby and *D. A. Smalley* for defendant.

1. There was no appeal from the order of the probate court appointing Englesby administrator, and therefore the appointment is conclusive; and if improper, can only be avoided, if at all, by appeal from the decree appointing. Compiled Statutes of 1850, Chap. 47, Sec. 28. 12 Mod. 618. *Harvard Coll.* v. *Amory*, 9 Pick. 446, 6 N. H. 116, and cases cited.

2. Englesby was appointed at the request of a majority of the next of kin; and whether suitable or not, was a matter in the discretion of the probate court, and cannot be enquired of here. The petition of the party is not to be regarded as evidence of the statements therein contained. The request of the majority of interests must govern. Toller on Ex. 89. 2 Kent Com. 410. *Taylor* v. *Delaney*, 2, C. C., 142.

The opinion of the court was delivered by

Isham, J. The demurrer in this case extends to the two first, and so much of the third plea in bar, as relates to the insolvency of the petitioner. Our attention, however, has been directed only to the first plea, as we entertain no doubt that the decree of the probate court therein set forth, is a bar to this petition.

This petition was not brought under that provision of our statutes authorizing the probate court to remove an administrator for

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matters arising subsequent to the appointment; for no matter arising subsequent to that decree, is stated or alledged in this petition. The reasons for which the petitioner now asks the prayer of his petition to be granted, existed before that decree of the probate court was made, to the same extent they now exist; and were, or might have been, the subject of investigation. We cannot in this collateral manner, review the correctness or propriety of that decree, or of any matters within the jurisdiction of that court, involved therein. Whether Mr. Englesby was a proper person to be appointed administrator or not, and whether a request of the next of kin, short of the whole number, should have been regarded by that court as sufficient to warrant the appointment as made, were all questions properly arising and directly in issue before the probate court, and which that court had ample and full jurisdiction to adjudicate and determine; and that adjudication has become a matter of record. This petitioner, if entitled as one of the next of kin, to letters of administration, and all other persons interested in that estate, were parties to those proceedings, and had they felt aggrieved thereby, a right of appeal was given to each. Compiled Statutes, 324, Sec. 28. The decrees of probate courts are as conclusive as the orders and decrees of any other court, when acting within the sphere of their jurisdiction; and particularly are they conclusive upon those to whom the right of appeal is given, and when that right is not exercised. *Probate* v. *Fillmore*, 1 D. Chip. R. 420. *Sparhawk* v. *Buel*, 9 Vt. R. 41. *Bush* v. *Sheldon*, 1 Days, R. 170. *Brown* v. *Lanman*, 1 Con. R. 467.

If an appeal had been taken from that decree, the questions which the petitioner seeks to raise on this proceeding, could have been directly presented and considered; but cannot be in this collateral manner. Having neglected and waived an appeal from that decree, the whole matter of this petition has become adjudicated, and all interested are thereby concluded.

The judgment of the county court must be affirmed and duly certified.

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William B. Viele *v.* Jarvis Hoag.

[In Chancery.]

Chancery Jurisdiction. Surety.

Though the liability of sureties is governed by the same principles at law, as in equity, a court of equity will not send a party suing there, to a court of law for a discharge or relief; but will extend the same relief, and exercise the same powers, in behalf of sureties, that were exercised before jurisdiction of this subject was entertained at law.

Nor is it in the power of a creditor, by first commencing proceedings at law, to deprive the surety from seeking his relief in chancery; and when there has been no delay or negligence in seeking relief in equity, a court of chancery will exercise a controling power over the parties in their proceedings at law.

If a bill is brought for discovery, merely, in aid of proceedings at law, and the discovery fails, the bill will be dismissed.

Sureties on a note are not discharged, where time has been given, if there has been a reservation of the right to call for payment, or a right to proceed against the surety.

Appeal from the court of chancery. The orator alledged in the bill, that Bial and Henry Boynton were partners in manufacturing of cloths and the purchase of wool, in Hinesburg, Vt., and in full business and credit, all of which was well known to the defendant; and on or about the 24th day of June, 1846, the defendant, being possessed of a large quantity of wool, proposed to sell it to the said B. & H. Boynton, the partnership firm of the said Bial and Henry, at and for the price of twenty-nine cents per pound, and to loan at the same time to said B. & H. Boynton such an amount of money, as would, when added to the sum total of the value of such wool at twenty-nine cents per pound, amount to the sum of one thousand dollars, and to take therefor, the note of said B. & H. Boynton and one Jedediah Boynton, and some other responsible person, as surety, payable in one year from date with interest. That B. &. H. Boynton, by the said Bial Boynton, who conducted the negotiation, told the defendant that the wool was much higher than wool of that quality was currently sold for; that defendant replied that he thought it would come to that price, and that it was an object to hire money at six per cent. That B.

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& H. Boynton accepted the offer, and the defendant named a person to be obtained as such surety, whom B. &. H. Boynton declined to procure, but offered in his stead the name of the orator. The defendant said he would accept a note for said thousand dollars, so signed by the orator with said B. & H. Boynton and Jedediah Boynton, for said sum and interest, payable on demand, and unless he should become dissatisfied with the security, he would let the debt run, and extend said credit for the term of one year, as was first proposed. The terms thus modified said B. & H. Boynton accepted, and in performance thereof procured the orator to sign, as such surety merely, without any consideration, a note for one thousand dollars, payable on demand to the defendant. And further, that at or about the expiration of one year, the defendant applied to B. & H. Boynton for payment of said note, and finally proposed to said B. & H. Boynton, if they would purchase of him a certain other lot of wool for cash, and pay the interest on said thousand dollar note, and four hundred dollars of the principal, that he, the defendant, on that consideration, would extend the time of payment for the residue of said note, another year; which proposition the said B. & H. Boynton accepted and agreed to pay, and did pay for said last lot of wool, the sum of thirty-two cents per pound; that the orator was wholly ignorant of such contract, or of there having been at any time, any contract whatever, other than what appears upon the note, and that the same was made without his knowledge or consent.

That on the 17th day of June, 1848, B. & H. Boynton and said Jedediah Boynton became wholly insolvent, and that about the 24th day of June, 1848, the said Jedediah Boynton deceased, wholly insolvent, and that the defendant sued out a writ of attachment on the 21st day of August, 1848, on said note, and attached a large amount of personal property of the orator, &c.

The defendant, in his answer, admitted the trade to be as set forth in the orator's bill, as to the thousand dollar note, but expressly denied that there was any agreement whatever between himself and the said B. & H. Boynton, or either of them, for the payment to him, directly or indirectly, for the loan of said money, anything more than legal interest therefor, or that there was any agreement for the sale of said wool for more than it was worth, as a cover for usurious or extra interest. That the defendant then considered it

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a fair price for the wool, and that it was the least price for which the defendant would have sold it. That said Bial Boynton proposed to the defendant to draw said note payable on demand, &c., and if defendant did not need the money, it might lay for some time. The defendant admitted the second trade as set forth, but expressly denied that said last mentioned wool was sold at any higher price than the same was worth; but that it was sold for rather less, or that the price of said wool was in any manner whatever, modified by any consideration connected with said note, or that said sale was in any way in consideration of, or connected with, any contract or agreement to extend the time of payment of said note, &c.

The testimony in the case did not differ materially with the answer of the defendant, and sufficiently appears in the opinion of the court.

Kasson & Edmunds and *Wires & Peck* for plaintiff.

1. The purchase of the wool in 1847, at that or any stipulated price, is a good consideration, whether above or below the market price; it was a good consideration, for a valid agreement to extend the time of payment on the balance of the note. Chit. on Con., 31–35.

2. The cases agree, that the surety may at any time, by bill in equity, compel the creditors to pursue the principal debtor, for his protection; but such a bill would not lie in this court, if he had by such an agreement, agreed to wait a year longer; the court would decline relief on the ground that the surety was discharged. *Rees* v. *Berrington*, 2 Ves. 542. *Hays* v. *Ward*, 4 J. C. R. 123 (132.) Nor is it material whether the money is due at the time of the contract to extend. *Ex parte Wilson*, 11 Ves. 410.—*Wright* v. *Simpson*, 6 Ves. 734.

3. The agreement to pay six per cent. interest for another year, is a sufficient consideration. *Bailey* v. *Adams*, 10 N. H. *Wheat.* v. *Kendall*, 6 N. H.

4. If it be urged that this court has no jurisdiction, or that the facts constitute a defense at law, we answer, (1.) That the act of the defendant in joining B. & H. Boynton in the suit at law, has precluded the orator from proving his defense. *Millen* v. *McKen*, 7 Paige, 451. (2.) This is a bill for discovery and relief, and if the

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court has jurisdiction for one purpose, it will attain it for all purposes. *Beardsley* v. *Knight*, 10 Vt. 185.

E. J. Phelps and *A. Peck* for defendant.

1. This bill should be dismissed, as not presenting a case within the appropriate jurisdiction of a court of equity.

The suit at law on the note was first commenced. The defense set up by the orator was just as available in the suit at law, as in this court, and governed there by the same principles as here. The only ground, therefore, upon which he was entitled to come into this court at all, was to obtain a discovery from the *defendant*. Except for this prayer, the bill would have been dismissed on demurrer. That discovery has totally failed, inasmuch as the facts of the defense were totally and explicitly denied by the answer. And the result is that the jurisdiction of the court fails with it.

Though there is a class of cases in which courts of equity having obtained jurisdiction for the purpose of discovery, will retain it for relief, this will never be done —

(1.) When the discovery fails, or turns out to be a mere pretence, or,

(2.) Where the suit at law previously exists, and the defense, after the discovery is had, is not of a character peculiarly cognizable in equity, and is perfectly available at law. 2 Story's Eq. par. 691. *Russell* v. *Clark*, Ex. 7 Cranch, 69. Kirby, 185. 2 Barber & Harrington, Eq. Dig. 28, 29, 30. 1 Johns. Ch. Rep. 49, 466. 1 Story's Eq. par. 64–74 and notes. 1 Fonblanqui's Eq. b. 1, ch. 1, par. 3.

2. There is another view of the case that is fatal to the orator.

The judgment in the suit at law is conclusive.

It is between the same parties, on the same note, and necessarily involving and concluding the same point now in controversy.

The only cases where a court of equity will relieve against a judgment, are,

(1.) Where the defense, from its peculiar character, was not available at law, or has accrued after the rendition of the judgment.

(2.) Where, though the defense would have been available at law, the party has by fraud, accident or mistake, been prevented from making it. 13 Vt. 477, and 15 do., 78. 1 Comstock, 274.

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1 Johns. Ch. R. 49, and 6 do., 87. 7 Cranch. 69, and 6 do., 33. 5 Howard, 141.

The evidence of Bial and Henry Boynton which refers to the price paid for the wool in 1846, when the note was given, is wholly immaterial. Because if the facts were as claimed, (which the answer wholly denies,) it could have no effect upon the present question.

As to the purchase of defendant's wool in 1847, at the time when it is claimed that the contract to extend was made, Bial Boynton, who transacted the whole business, states no definite or binding contract at all. He says defendant first called for the whole amount of the note, but afterwards said if he could sell his wool, he could get along with so much less, and the balance might lie another year, as was originally contemplated. Whereupon he bargained for, and purchased the wool, and paid for it. He adds that he finds from the wool book that he paid one or two cents higher for the wool, than they were paying others at that time. But he does not state that this was so understood by defendant, nor that it constituted any consideration for the extension, or was connected with it in any way. His testimony is entirely reconcilable with the answer.

From the whole evidence it is very apparent that the case is the common one of a note being tacitly permitted to lie after due, upon a mere understanding or expectation of the parties, as to when the money shall be called for, without any binding contract for a definite extension or any consideration for such contract.

The opinion of the court was delivered by

Isham, J. The general object of this bill is for discovery and relief from the payment of a note executed by the orator, as surety for B. & H. Boynton, and on which the defendant has commenced a suit at law. The ground upon which relief is sought, is an extension of the time for the payment of the note for one year, granted by the payee to the principals, without the knowledge or consent of the surety. And that within that period, the Boyntons became insolvent. An objection has been urged against this proceeding, involving the jurisdiction of this court over its subject matter; and it is insisted that an ample remedy may be had in the suit at law; and that a bill for relief cannot be sus-

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tained where that remedy exists. And as the orator in this case, has failed in his discovery, and jurisdiction cannot be entertained on that ground, it is claimed that the bill should be dismissed.

The subject of equitable relief in behalf of sureties, is one of original jurisdiction in a court of chancery. The peculiar rights of a surety originated in, and are exclusively the growth of equity. Formerly it was held in several instances, that the remedy of the surety was only in equity, and could not be made available in courts of common law. But it is now held as a general rule, "that the liability of sureties is governed by the same principles "at law, as in equity." And probably with few exceptions, the same considerations which are sufficient in equity to discharge the surety, will be available for the same purpose at law. 2 Lead. Cases in Eq. 365, 386 in notes to *Rees* v. *Berrington*.

But "a court of equity will not send a party suing there, to a "court of law for the discharge or relief to which he is equally "entitled in equity." But will extend the same relief and exercise the same powers in behalf of sureties, that were exercised before jurisdiction of this subject was entertained at law. 2 Lead. Cases in Eq., pt. 2, 365. *Samuel* v. *Howorth*, 3 Mr. 278. *Mayhew* v. *Cricket*, 2 Swans. 185, and 529. *Eyre* v. *Everett*, 2 Russ. 382. 3 Hare, 567.

Justice Story remarks, Eq. Juris. Sec. 64, (i) "That the juris- "diction of courts of equity is not changed or affected by the "courts of law now entertaining jurisdiction in cases where they "formerly rejected it. They cannot enlarge or restrain the pow- "ers of a court of equity at their pleasure; for their jurisdiction "is of a permanent and fixed character, and being once legiti- "mately vested, it must remain until the Legislature shall abolish "or limit it." So in *Kemp* v. *Pryor*, 7 Ves. 249, Lord Eldon says, "I cannot hold that the jurisdiction of courts of equity is gone "merely because the courts of law have exercised an equitable "jurisdiction." In all such cases the party may seek his relief at the hands of either. Neither is it in the power of a creditor, by first commencing proceedings at law, to deprive the surety from seeking his relief in chancery. And where there has been no delay or negligence in seeking relief in equity, a court of chancery will exercise a controling power over the parties in their proceedings at law. The jurisdiction, therefore, of this court, in

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the case under consideration, does not depend upon the fact that this bill is framed *for discovery* as well as relief. For it would be entertained for relief if no discovery had been asked, as being a matter within its original jurisdiction.

If this had been a bill for discovery, merely in aid of proceedings at law, if the discovery failed, the bill would be dismissed. But as this bill is for relief as well as discovery, and the prayer of the bill is for that relief which is within the original powers of a court of equity, though the discovery has failed, yet the bill will be entertained for relief. 1 Story Eq. Sec. 73, 74. *Russell* v. *Clark*, 7 Cranch. R. 69. Welf. Eq. plea, 132.

We see no reason for dismissing this bill for the want of a proper jurisdiction in this court over its subject matter.

The case is then resolved into those questions that arise upon its merits. It is not deemed important to recapitulate the facts stated in the bill and answer, nor the depositions of the witnesses, nor to enter into an investigation of the answer, to see whether it is as full as the stating or interrogating part of the bill requires, as there is not that contradiction in the testimony that renders it difficult to arrive at a proper result. The original note was executed June 24, 1846, by B. & H. Boynton as principals, and Jedediah Boynton and the plaintiff, as sureties. Its consideration was money lent and wool sold by the defendant to the Boyntons to the amount of one thousand dollars. When the note was executed, it was at first contemplated to take the same payable in one year, if certain security was obtained. As that could not be effected, the present note with the plaintiff as surety, was taken on demand. The object for taking the note payable in that manner is explained in the testimony of Bial Boynton. He testifies that when the note was given, it was agreed that the defendant should wait one year, at least, and probably longer, and that this note was made payable on demand at his suggestion, so that if the defendant became dissatisfied with the security, they would be obligated to exchange it.

The defendant states in his answer, that the note was executed in that manner by the suggestion of Boynton, so that if he was dissatisfied about the safety of the money, he might secure himself at any time, and that if he should not need the money, or become dissatisfied with the security, it might lie one, two, or more years.

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This difference in phraseology cannot create much doubt as to the real intention of the parties at the time of the execution of that note. The conviction arising from the manner in which the business was done, and the object they had in view in making the note payable on demand, cannot well be overcome,—that it was so made, for the purpose, and with the right expressly reserved, to enable the defendant, as payee of the note, to call upon the makers for the money at any time he saw fit. There was unquestionably an expectation and understanding between them, that the note should lie for one year, and longer in case the defendant did not become dissatisfied with the security; but subject to the right, however, to call for the money, and prosecute the note at any moment he chose. This mutual understanding, and this right of the defendant, is to be inferred from a fair construction of the testimony of Bial Boynton, which was put into the case on the part of the orator. The defendant did permit the matter to lie during that year, and no complaint has been, or is now made of any matter arising out of that arrangement.

At or about the expiration of the first year, we have from the testimony in the case, that the defendant notified the Boyntons that he should want a payment on that note, of six hundred dollars for his personal use. An arrangement was finally effected, that if the Boyntons would pay the interest on the note, four hundred dollars on the principal, and pay him for his wool of that year, amounting to over two hundred dollars, the note might lie another year; as by that arrangement he would be possessed of means necessary for his use. This arrangement as stated by the parties and witnesses, bears the impress of a mutual effort to satisfy the wants of the defendant with as small a draft as possible on the principal of the note, and to carry into effect the understanding of the parties at the time the note was originally given. For thereby the defendant would be accommodated in the money he wanted, and the Boyntons, in obtaining time on the balance of the note as was contemplated, besides obtaining the wool which they wanted in their business. And in that negotiation we can only draw the inference that the parties intended that the balance of that note should remain another year, under the same arrangement and understanding that existed the year before. The defendant was to retain the same note payable on demand, with the

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right of calling for the same at any time during the year, that he saw proper. What was said in relation to the delay for another year, was in view of the previous arrangement the year before, and to carry that understanding into effect, that the note might lie for one, two or more years, unless he became dissatisfied with the security, or wanted the money for his own use. In that event the right was reserved to call for and collect the amount due, whenever he deemed it necessary or important.

Under this view of the facts in the case, there is nothing in that arrangement of which the surety has reason to complain, or which entitles him to the relief he has sought. The right of the creditor has been reserved to collect at any time. The right of the surety also has been preserved; for had he felt insecure, he might have paid the note, and proceeded in his own name, to secure the debt, or petitioned the court of chancery for an order upon the defendant to proceed in the collection of the debt, of the principals; and the defendant, as holder of the note, might have complied with such requirement and order, if made without violating any contract or even conscientious obligations.

Sureties on a note are not discharged where time has been given, if there has been a reservation of the right to call for payment, or a right to proceed against the surety. 2 Lead. Cases in Eq. 360, 379, in notes to *Rees* v. *Berrington*. The case of *Nichols* v. *Norris*, 3 Barn. & Ad. R. 41, was a deed of composition which the creditor signed and thereby agreed to extend the time of payment, and receive payment by installments. But as he had expressly reserved his right to proceed at any time against the surety, the surety was held not discharged. In the case of *Melville* v. *Glendining*, 7 Taunt. R. 126, the plaintiff received bills of exchange from a defendant under an agreement that he should not be precluded from prosecuting while the bills were running. It was held, the surety was not thereby discharged. The same doctrine is sustained by the case of *Blackstone Bank* v. *Hill*, 10 Pick. R. 132. *Oxford Bank* v. *Lewis*, 8 Pick. R. 458. *Claggett* v. *Salmon*, 5 Gill and John. 314. *Bangs* v. *Strong*, 10 Paige, 11. 2 Lead. Cases in Eq., 360, 379, in notes to the case of *Rees* v. *Berrington*. We think, therefore, the plaintiff in this case has failed in showing such a contract as entitles him to the relief for which he has prayed.

The decree of the chancellor must be affirmed, with costs.

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Davis & Aubin v. John Bradley & Co.

Trover. Sale and title. Bill of sale to be treated like other written instruments, and not open to explanation by parol testimony. Estoppel in pais.

Under a conditional sale or contract, the general property never passes, and when the payment of the stipulated price, under such sale, is made a condition precedent, payment must be made before the title vests in the purchaser.

But where S. & C. sold a quantity of wool to B. & H. B. and sent them an absolute and unconditional bill of sale, advising them by the bill of sale, that the wool was shipped to Bradley & Co., at Burlington, subject on its arrival, to their order, of which immediately after its arrival, B. & H. B. took possession. It was held—that the bill of sale passed an immediate and vested title to the wool, in B. & H. B.

A bill of sale, absolute and unconditional in its terms, and free from ambiguity, is governed by the same principles, that regulate other written instruments, and parol testimony cannot be received to contradict, add to, or vary it, for "the bill of sale must be considered as the final contract between the parties."

S. & C. sold a quantity of wool to B. & H. B. and shipped the same to Burlington, to the care of B. & Co., and sent a bill of sale to B. & H. B., advising them, in said bill of sale, that said wool was shipped to the care of B. & Co., and subject to their order; upon the arrival of the wool at Burlington, said B. & H. B. took possession of, and assorted the same, and re-shipped twenty-one sacks, and consigned the same to D. & A., at Boston; taking at the time, a receipt for the same of B. & Co. forwarding merchants; the said receipt B. & H. B. sent to said D. & A., and also made a draft upon them, for the full value of the wool; the said draft was accepted and paid by said D. & A. The said wool, after it was thus re-shipped, and while *in transitu*, was attached as the property of B. & H. B., and brought back and placed in the store-house of B. & Co., for safe keeping. In an action of Trover, brought by D. & A. against B. & Co. for said wool—it was *held*—that S. & C. are concluded, *by their acts*, from denying the title, and right, of B. & H. B. to this property, by the execution of their bill of sale, and order, for the delivery of its possession. And that B. & H. B. were equally concluded by their consignment of the property to D. & A., and their draft on them for its value. And that B. & Co. were also concluded, from denying D. & A.'s title to the property, and their right to immediate possession by the execution of their receipt for the same, as forwarding merchants.

And it was also held—that so far as D. & A. were concerned, the *acts* of all these parties operate as an estoppel *in pais*, preventing them from making any claim to this property, even, if as between B. & H. B. and S. & C., the property was wrongfully disposed of by B. & H. B.

Trover, for a quantity of wool. Plea, the general issue, and trial by the court.

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The plaintiffs, to sustain the issue on their part, offered a bill of sale, of a quantity of wool, from Sanborn & Catlin to B. & H. Boynton, of which the following is a copy, viz:

"Bill of Sale."

"SWANTON, JUNE 2, 1848.

"B. & H. Boynton,

"Bought of Sanborn & Catlin,

"2042 lbs. superfine wool,		
"2072 " fine wool,		
" 922 " coarse wool,		
" 190 " No. 2, coarse wool,		
" 147 " washed wool,		
" 268 " black wool,		
"5641 " pelt wool, 28 cts.,		$1579.48
" 329 " tags 3 cts.,		9,87
"3110 " coarse unwashed wool 18 cts.,		559,80
" 45 sacks of wool,		$2149,15
"Cartage on the above to St. Albans,		8,75
"		$2157,90
"1 note in three months,	$400,00	
" Interest,	6,00	
"	$406,00	
"1 note in nine months,	$400,00	
"The balance in six months,	$1357,90	

"The above wool is shipped to the care of Bradley & Co. sub-"ject to your order. Truly yours,

(Signed) "SANBORN & CATLIN."

"P. S. You will forward us notes to settle the above bill soon. "for we want the three month note to use.

"Swanton, June 11, 1848."

(Signed) "S. & C."

The plaintiffs then introduced evidence tending to prove, that the wool was drawn by said Sanborn & Catlin, to St. Albans Bay, there shipped to John Bradley & Co., the defendants, at Burlington, who were wharfingers and forwarding merchants at that place, and subject to the order of B. & H. Boynton. The plaintiffs also introduced evidence tending to prove, that the wool was delivered on the defendants' wharf at Burlington, per steamboat, part on the 10th, and part on the 13th of June, 1848, and then taken posses-

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sion of by B. & H. Boynton. The fine parts thereof weighing 4039½ pounds, marked "Forwarded, Davis & Aubin, Boston," by said B. & H. Boynton, and a receipt taken therefor, of which the following is a copy, "Received of B. & H. Boynton, twenty-one "bales wool to be forwarded to Davis & Aubin, Boston."

"Burlington, June 13, 1848."

(Signed) "JOHN BRADLEY & Co."

"By Strong."

That on the same 13th of June, the said B. & H. Boynton wrote the plaintiffs, advising them of the consignment of said wool, and sending them an invoice thereof, and enclosing the receipt aforesaid, and drew on the plaintiffs for the full value of the said wool, which drafts, were by said plaintiffs, accepted and paid, for which payment the said B. & H. Boynton are now indebted to the plaintiffs.

Also evidence tending to prove, that said wool was shipped, and taken on board of a canal boat as far as Orwell, towards Boston, and there attached, as the property of B. & H. Boynton, and brought back and put in the defendants' store-house, in Burlington, for safe keeping. That soon after this, and while the wool was in defendants' store-house, and before this suit was brought, the plaintiffs demanded of the defendants, the wool in question; they refused to deliver it up, saying "that there were a number of claimants for the wool, and they thought they should hold it, until they found who was entitled to it."

The defendants then offered parol evidence to prove, that the sale of the wool, from said Sanborn & Catlin, to B. & H. Boynton, was a conditional sale, that at the time of making the contract therefor, between Sanborn & Catlin and B. & H. Boynton, on the 2d of June, 1848, the price of the wool was agreed between them, and further, that it should be weighed and sacked by Sanborn & Catlin, and carted from Swanton to St. Albans Bay, and there shipped to Burlington, subject to the order of B. & H. Boynton. That said Sanborn & Catlin should send a bill thereof, to B. & H. Boynton, at Hinesburgh, and that said B. & H. Boynton should at once thereafter, procure and send the said Sanborn & Catlin, three notes payable in three, six, and nine months, for amount of said bill, the two last named notes to be signed by said B. & H. Boynton, and Jedediah Boynton, and some other respon-

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sible person. That the title to said wool, was not to vest in said B. & H. Boynton, until said notes were thus furnished, but was to remain the property of Sanborn & Catlin. That on the 17th of June, 1848, said B. & H. Boynton failed, and have ever since been insolvent; that said notes were never furnished to said Sanborn & Catlin, though they demanded them of said B. & H. Boynton, the first of July, 1848; that said Sanborn & Catlin demanded said wool of Eli Chittenden, the special officer, who attached, and also the general agent of the defendants, (having the management and control of all their wharves and store-houses and property stored therein,) on the same day that the plaintiffs demanded the wool of these defendants, that he replied, "there "were other claimants of the wool, and he would not deliver it to said "Sanborn & Catlin;" and that said Sanborn & Catlin brought a suit against said Chittenden, for said wool, which is now pending in Franklin County Court.

To the admission of this evidence, the plaintiffs objected, on the ground that it would vary and control the written contract and bill of sale.

The court, March Term, 1851,—BENNETT, J., presiding, excluded the testimony, and rendered judgment for the plaintiffs. To which decision of the court, excluding the parol evidence offered by the defendants as to the bill of sale, the defendants excepted.

D. A. Smalley and *E. J. Phelps* for the defendants.

This case presents these questions for the consideration of the Court.

1. Can the defendants, standing upon the title of B. & H. Boynton, introduce parol evidence to show what the real contract was between Sanborn & Catlin and B. & H. Boynton, notwithstanding the bill of sale.

In the case of a blank indorsement upon a note, or a memorandum of the amount of property sold, it is well settled, that parol evidence is admissible to show the extent of the contract. *Barrows v. Lane*, 5 Vt. 161.

2. It is insisted by the defendants, that the plaintiffs would have the right to introduce parol evidence of the contract, as between themselves and Sanborn & Catlin and B. & H. Boynton; and the defendants, standing between them, are entitled to the same right.

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3. The facts, offered to be proved, show that the transaction was a fraud upon Sanborn & Catlin.

Fraud in a contract may always be shown.

L. E. Chittenden for the plaintiffs.

A single question is presented by the bill of exceptions, which has been too often settled by this court, now to admit of much discussion.

The evidence offered by the defendants, was offered for the express purpose of contradicting the bill of sale, which is the only legal evidence of the contract between Sanborn & Catlin and B. & H. Boynton. It proposed to ingraft upon the contract a parol condition, that the title to the wool should not pass to the Boyntons', until certain notes were forwarded to Sanborn & Catlin. This it was not competent for the defendants to do. *Reed* v. *Wood*, 9 Vt. 285. *Lasso* v. *Neale*, 3 Com. Law, 267. 3 Starkie on Ev. 1005-6. *Hatch* v. *Hyde*, 14 Vt. 25-459. *Isaacs* v. *Elkins*, 11 Vt. 679. *Bradley* v. *Bentley*, 8 Vt. 243. *Mumford* v. *McPherson*, 1 Johns. Rep. 413. 2 Kent Com. 498. 1 Johns. 139. 3 Johns. 68. 1 Cowen, 249. 5 Cowen, 144.

The opinion of the court was delivered by

ISHAM, J. The plaintiffs' right to the property for which this action is brought, depends upon the title of B. & H. Boynton, under their bill of sale from Sanborn & Catlin. As against the Boyntons the plaintiffs' title has not been disputed. But it is insisted that the Boyntons had no title to this property, and consequently could convey none to the plaintiffs, and that it was competent for the defendants to introduce parol evidence showing that the sale, from Sanborn & Catlin to the Boyntons, was made upon certain conditions, which having never been performed, the property never passed from them. If the testimony offered by the defendants is admissible, there is no doubt such would be its effect; for it has been frequently decided in this State, that under a conditional sale or contract, the general property never passes, and when the payment of the stipulated price, under such a sale, is made a condition precedent, the payment must be made before the title vests in the purchaser. *Bigelow* v. *Huntley*, 8 Vt. R. 151. *Smith* v. *Foster*, 18 Vt. R. 182.

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For the purpose of showing the title of the Boyntons to this property, and their right to sell the same to the plaintiffs, the bill of sale executed on the 2d of June, 1848, by Sanborn & Catlin to B. & H. Boynton, was introduced in evidence. There is no ambiguity on the face of this instrument. It is full and express in all its provisions, and contains an absolute and unconditional transfer of forty-five sacks of wool by Sanborn & Catlin to the Boyntons, twenty-one sacks of which is the subject of this suit. The Boyntons are advised by that bill of sale that the wool was shipped to Messrs. Bradley & Co., at Burlington, subject on its arrival to their order, and of which we find they immediately after took possession. The notes to be given for the wool are referred to, the amount specified for which each are to be given, and when to be made payable. It contains no provision that the delivery of the notes was to be made before the property passed to the Boyntons, or that the wool was to remain the property of Sanborn & Catlin, until the notes were delivered. But on the contrary, the bill of sale passes an immediate and vested title to the wool, in the Boyntons, with the absolute right of possession, under the directions given to the defendants, as wharfingers, to hold the property *subject to their order*. It is manifest also from the instrument itself, that the parties intended that such should be its effect, for in a postscript to the instrument, a request was made so late as the 11th of June, and after part of the wool had been received, "that the notes for the wool *be forwarded soon*, as the three months note was wanted for use." At this period, *time was given* for the delivery of the notes, with the limitation, however, that it be done soon. This limitation is inconsistent with the idea, that they were to retain a title to the wool as security for the delivery of the notes, and is consistent with the legal effect of the instrument, that the title vested at the time of the sale, and reliance placed on the assurances of the party for the subsequent delivery of the notes. When, therefore, the defendants offered to prove that the sale on the 2d of June, 1848, was conditional—that part of the notes were to be signed, not only by the Boyntons, but also by some other responsible persons, and that the title to the wool was to remain the property of Sanborn & Catlin, until the notes were furnished,—they were offering to prove a contract, in many important particulars, different from that stated in their bill of sale.

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It contradicts its specific provisions, by making that conditional, which is absolute on its face. It adds to the contract of sale, other stipulations and provisions not mentioned or referred to in the instrument, not only in making the delivery of the notes a condition precedent, but requiring them to be executed, with other security, all of which essentially changes the legal effect and operation of the bill of sale. If this instrument is governed by the same principles that regulate other written contracts, the admission of the testimony would plainly violate that general rule of evidence, that parol testimony cannot be received to contradict, add to, or vary the terms of a written instrument. The authorities are quite uniform in placing these bills of sale on the footing of other written contracts, as being equally unaffected by parol testimony. They were so treated in the case of *Read* v. *Wood*, 9 Vt. R. 285. The court there say, "that whenever there is a sale, and a bill "of sale, or sale note is given, such bill of sale is the evidence of "the contract, and cannot be varied. It is the legitimate and "proper evidence of the contract and of the terms and conditions "thereof," and the party was not permitted to prove by parol, a warranty of goods, as it added a provision to the contract not therein mentioned. In *Lane* v. *Neale*, 2 Stark. R. 105, it was held that parol testimony could not be received to show that other articles of personal property were included in the sale, as they were not mentioned in the sale note. Lord Ellenborough there says, "that the bill of sale must be considered as the final contract be- "tween the parties." In *Mumford* v. *McPherson*, 1 Johns. R. 413, it was held that parol evidence was inadmissible to prove other provisions in a contract of sale, not mentioned in the bill of sale. THOMPSON, J., remarked "that the contract between the parties "was reduced to writing, and contained in the bill of sale, and "recourse must be had to that instrument to ascertain its extent. "The writing must be considered as the evidence of the agreement, "and everything resting in parol becomes thereby extinguished." No language can be more emphatic or applicable to the case under consideration, than this. And if in those cases, such testimony was inadmissible to prove stipulations upon which the bill of sale was silent, it would obviously be inadmissible in this case, where it contradicts its express provisions, adds to it stipulations not there mentioned, and changes its legal character and effect. Such

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is the rule as between the parties to the instrument, and it derives additional force when it is offered against a third party who has made advances upon the property, relying upon the good faith of the parties in the execution of the instrument.

If, as contended by counsel, this instrument was nothing more than a memorandum of the property sold, and if the parties did not intend to put the evidence of their contract and sale, in writing, the admission of this testimony could be urged with greater propriety. It was upon this principle that the case of *Allen* v. *Pink*, 4 Mes. & Wels. 145, was decided, and upon this ground only can the cases of *Bradford* v. *Manly*, 13 Mass. R. 142, and *Boormon et al.* v. *Johnson*, 12 Wend. 566, be sustained. The principle of those cases can have no application to this, for this instrument is clear and specific in setting forth a contract, the parties thereto, its subject matter, the property sold, the price and manner of payment, as well as the terms of the sale. To defeat the legal operation of such an instrument, and divest a party of his title to property so transferred, by the introduction of parol testimony, would be a violation of established rules of evidence.

There is another view of this subject that renders the admission of this testimony quite objectionable. Sanborn & Catlin have placed this property in the possession of the Boyntons by their directions to the defendants, as wharfingers, to hold the same, subject to their order, and with this order they have executed and delivered to them, a bill of sale, affording the highest evidence of absolute and unconditional ownership. On the strength of this bill of sale and possession, the Boyntons have obtained the receipt of the defendants, as forwarding merchants, for the tranportation of this property to the plaintiffs, at Boston, on its consignment to them. The execution of this receipt by the defendants, as forwarding merchants, and its delivery to the plaintiffs, was a constructive delivery of the property to them, as much so as the indorsement of a bill of lading. *Gardner* v. *Howland*, 2 Pick. R. 599. 1 Smith's L. C. 752, *Lukbarrow* v. *Mason*, and notes. With this evidence of title and possession in the Boyntons, *proceeding from the act of Sanborn & Catlin*, and with the evidence of consignment and delivery to the plaintiffs, they have accepted the same, and paid the drafts of the Boyntons upon them, on its account, for its value. It will operate as a *great fraud on the plaintiffs*, if they are compelled

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not only to lose this property, but also the money advanced, by testimony showing that this absolute bill of sale was untruly executed, and that another agreement in parol, was made at the same time, under which they are to be divested of that title to this property, which the bill of sale on its face, purports to convey. Such evidence is inadmissible on the ground of fraud, as well as contradicting the terms of a written instrument.

Sanborn & Catlin are concluded *by their acts*, from denying the title and right of the Boyntons to this property, by the execution of their bill of sale, and order for the delivery of its possession. *The Boyntons* are equally concluded, by their consignment of the property to the plaintiffs, and their drafts on them on its account, for its value. *The defendants*, also, are concluded from denying the plaintiffs title to the property and their right to its immediate possession, by the execution of their receipt for the same, as forwarding merchants, therein acknowledging to have received the property of the Boyntons, to be forwarded by them to the plaintiffs, at Boston. So far as the plaintiffs are concerned, the acts of all the parties operate as an *estoppel in pais*, preventing them from making any claim to this property, even, if as between the Boyntons and Sanborn & Catlin, the property was wrongfully disposed of by the Boyntons. Thus in *Pickering* v. *Rusk*, 15 East. R. 38, where the owner of hemp caused it to be entered on the books of the wharfinger, in the name of the broker, who was its purchaser for him, the owner was held bound by an unauthorized sale by the broker to another, on the ground *that the entry on the books of the wharfinger, was by the directions of the owner*, and was a fraud on the purchaser, unless it was intended that he should be authorized to deal with the property as his own. Lord Ellenborough remarked, "That strangers can only look to the acts of the parties, and "to the external *indicia* of property, and if a person authorize an- "other to assume the apparent right of disposing of property in "the ordinary course of trade, it must be presumed that the appar- "ent authority is the real authority. That if the plaintiff intended "to retain the dominion over the hemp, he should have placed it "in the wharfingers books *in his own name*." So in the case of *Dyer* v. *Pearson*, 3 Barn. & Cress. R. 38, ABBOTT, Ch. J., remarked, "That it should have been left to the jury to say whether "the plaintiff had *by his own act*, enabled Smith (the agent) to

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"hold himself out to the world as having not the possession only, "but the property. For if *the real owner* of goods suffer another "to have possession of his property, and of those documents which "are the *indicia* of property, then perhaps, a sale by such person "would bind the true owner." This doctrine has a very direct application to this case. For it was the *act of Sanborn & Catlin* that furnished the Boyntons with this absolute bill of sale, giving them the highest evidence of ownership and right of possession, and upon the strength of which the plaintiffs have purchased the property and made the advances.

Formerly the mere acts, or admissions of a party, when not under seal, or of record, were not considered as estoppels, and had no other weight than that of evidence, more or less strong, as might be considered by the court or jury. "But it has been properly "observed that the recent decisions of the courts, both in this "country and in England, have given a much broader scope to the "doctrine of estoppels *in pais*, than that which it had formerly, and "have established, that whenever an act was done, or statement "made, which cannot be contravened or contradicted without fraud "on his part, or injury to others, whose conduct has been influ- "enced thereby, the character of an estoppel will attach to that, "which otherwise would be matter of evidence, and it will become "binding, *even in opposition to proof of a contrary nature.*" 2 *Smith's Lea. Cas.* 561, and cases there cited. And this principle is of general application where there is — 1st, An act or admission inconsistent with the evidence offered, or title set up, — 2d, An act of the other party influenced or induced by such act or admission, and — 3d, An injury resulting therefrom, by permitting the act or admission to be disproved. Where these several matters unite, the links in the chain are formed for the application of the doctrine of estoppel *in pais*. *Dazell* v. *Odle*, 3 Hill R. 219. *Picord* v. *Sears et al.*, 6 Ad. & El. 469. *Gregg* v. *Wells*, 10 Ad. & El. 54. *Dameys* v. *Field*, 4 Met. R. 384. *Hatch* v. *Kimball*, 16 Maine R. 146. 17 Vt. R. 449. *Hicks* v. *Cram*, 2 Smith's Lead. Cas. 562, in notes.

These facts all exist, and these various matters unite, in the case under consideration. For in the first place, there is the act of Sanborn & Catlin, in executing the bill of sale, and the delivery of the order, with the act of the Boyntons in making the consignment of

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this property to the plaintiffs, and the act of the defendants, as forwarding merchants, in executing their receipt, and agreeing to transport the property to the plaintiffs, at Boston. In the second place, there is the act of these plaintiffs, in accepting the property consigned, and paying the drafts that were made on its account, all of which are inconsistent with the title and claim now set up, and offered to be proved. And in the third place, there is the damage that will be sustained by the plaintiffs in allowing those facts to be disproved, in the loss of this property, as well as the money advanced. In preventing the party from making such claim, by the rejection of testimony offered, the equity and justice of the case was evidently sustained.

The case of *Mc Combie* v. *Davis*, 6 East. R. 583, is not inconsistent with the principles here decided, as in that case, the evidence of title was *wrongfully obtained*, and *without the act of the owner of the property*, and therefore, he shall not be estopped.— And of this character are those cases where sales have been made without authority, or with the possession of those evidences that are not *proper documentary evidences of title.* But where one has the proper documentary evidence of title, *given by the owner of the property*, he is bound by whatever disposition is made of it. In such case there is force and propriety in the suggestion, that where one of two parties must suffer from an unauthorized act, the loss should fall upon the owner who has intrusted the party with the possession of his property and the evidence of title, and thereby enabled him to commit a fraud, and should not be visited on the vendee, who has acted in good faith, and with proper caution. We think, therefore, the testimony offered was properly rejected, and that the judgment of the county court must be affirmed.

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PERKINS, DOE & CO. *v.* HARRY BRADLEY.

Agent and Treasurer of Companies. Their Authority and Acts. Indorsement. Declaration.

The general Agent or Treasurer of a corporation or joint stock company, have the right to negotiate notes and bills taken in his name of office, and where it appears that such companies intrust their treasurer or general agent to take notes, and he indorses them, his acts will bind the company.

And this authority is to be implied from his being treasurer of the company, and intrusted with the notes of the company, and their being made payable to him.

And in declaring, it is sufficient to describe the history of the plaintiff's title to the note, without setting forth the authority of the treasurer.

And it would be sufficient description of the indorsement to say "and by them indorsed to the plaintiff." So, also, it would be sufficient to say "that the agent of said company indorsed said note to the plaintiff," without describing said agent, or his authority.

ASSUMPSIT upon a promissory note for one thousand dollars, dated April 3, 1849, executed by the defendant and made payable six months after date thereof, for value received, to the order of the treasurer of the Burlington Mill Company, and by the said treasurer indorsed to the plaintiffs. The action was brought in the name of the plaintiffs, as indorsees of the note; the declaration set forth, that the defendant made his note in writing, payable to the order of the treasurer of the Burlington Mill Company, and that said treasurer indorsed said note before payment, by which indorsement he, the said treasurer, ordered and appointed the said sum of money therein specified, to be paid to the plaintiffs, &c.; but did not describe the said treasurer or Mill Company otherwise than as above stated.

The defendant demurred to the declaration for the causes, "that said declaration does not set forth to whom the promissory note declared on was made payable, nor by whom the note was indorsed to the plaintiffs."

The plaintiffs joined in demurrer. The case was tried by the court on demurrer, March term, 1850,—BENNETT, J., presiding. The court adjudged the declaration insufficient, and that defendant recover his costs. Exceptions by the plaintiffs.

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S. Wires and *W. W. Peck* for the plaintiffs.

1. The declaration sets forth facts, which in law import a promise to the Burlington Mill Company. *Vt. Cen. R. R. Co.* v. *Clayes*, 21 Vt. R. 30. *Commercial Bank* v. *French*, 21 Pick. R. 486. *Bailey et al.* v. *Onondago County Ins. Co.*, 6 Hills R. 476.

2. The declaration shows an indorsement to the plaintiffs by the payees of a promise. If a promise to the agent or treasurer of the payees, was a promise to them, an indorsement by the agent or treasurer of the payees was an indorsement by them, and the averment of the indorsement by the agent or treasurer is equivalent to the averment of an indorsement by the payees. The averment in the declaration is equivalent to an averment that the payees indorsed by their treasurer, and that would clearly have been good. Story on Agency, 115. Angel & Ames on Corporations, 295 and 296.

Charles Russell for defendant.

1. The declaration does not sufficiently aver the plaintiffs to be legally entitled to the note, so as to maintain this action in their names as indorsees. Gould's Pl. 172, Sec. 7 and 8. 1 Chitty Pl. 302.

The Burlington Mill Co. is the payee of the note. It is now well settled that a note in form, payable to the officer, as treasurer or clerk of a corporation, not otherwise naming him, and at the same time naming the corporation, is a note payable to the corporation which is named, and must be declared on as such.

The declaration ought to have declared upon the described instrument as a note made to the Burlington Mill Company, and that the company indorsed it to the plaintiffs. The declaration contained no such averment, and is bad. *Bank of the U. S.* v. *Lyman et al.*, 20 Vt. R. 666. *Vt. Cen. R. R. Co.* v. *Clayes*, 21 Vt. 30.

2. If in law, the treasurer of the company might maintain an action on the note declared on in his own name, and might indorse the note to the plaintiffs so as to transfer to them the legal interest and right of action,—yet the declaration is bad, for the reason that the declaration does not set forth to whom the note was made, nor by whom it was indorsed. The declaration does not alledge that any person, nor who was treasurer, that any person, nor who

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indorsed the note. Chitt. on Bills 10, Ed. 227 and 228. 2 Chit. Pl. 124.

3. A legal indorsement of the note being necessary to give the plaintiffs the right of action in their own names, the indorsement is a material and traversable fact. The declaration ought, therefore, by averment to have informed the defendant that there was a treasurer of the Burlington Mill Company, and who was such treasurer; that the defendant might traverse the allegation. 1 Stephens, N. P. 949.

By the Court. The causes of demurrer assigned in the demurrer, are, that it does not appear by the declaration, to whom the note was made payable, or by whom it was indorsed.

It seems to be conceded, that a promissory note payable to a corporation's agent, or officer, described as such, is payable to the corporation. If so, then this note, upon the face of it, is to be regarded, as made payable to the Burlington Mill Company, and it is sufficient so to declare, describing it in terms. This company is not described as a corporation, but its very name seems to indicate that it is either a corporation, or a joint stock company, and not an ordinary mercantile partnership. And both these classes of companies transact their business exclusively by agents. And when it becomes necessary for them to deal to any extent in negotiable paper, this is done by agents in pursuance of the Statutes and By-laws of the company; or what is equally binding upon them, according to the usual course of their business.

In the case of banks, this is done by cashiers; by railroads this is done by superintendents or treasurers; and so of other similar corporations, or joint stock companies.

It is now perfectly well settled, that a note payable to the cashier of a bank, may be indorsed by him, and so, too, if made payable to the bank; for the courts take notice that such is their business. *Wild* v. *Bank of Passamaquoddy*, 3 Mason, 505. "*Prima facie*, therefore," says Judge Story, in this case, in regard to the power of a cashier of a bank, "he must be deemed to have authority to transfer and indorse negotiable securities held by the bank for its use and its behalf." And we think the known general agent of all these companies, must be taken to have the right to negotiate such notes or bills as are taken in his name of office,

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and intrusted to his care and control. And *ex vi termini* the office of treasurer and cashier are identical, i. e., the one who has the custody of the cash or securities, the moneys and property of the company.

For myself, I am content to adopt one standing rule of construction, which now has become universal, both as to pleading and contracts, which may be considered a free translation of the latin maxim, *ut res magis valeat*, so to construe everything, that all which is good may prevail, and all which is bad, perish; and that those who attempt to escape from apparent justice by criticism, ought not to complain if reasonable intendments only are made to defeat unnatural and unreasonable ones.

The same rule would, no doubt, be extended to other financial agents of such companies. And where it appears that such a company intrusts their treasurer to take notes, and he indorses them, his act should bind the company. And if his authority is to be implied from his being the treasurer of the company and intrusted with the notes of the company, and their being made payable to him, and we think this cannot be denied, then it is sufficient so to describe the history of the plaintiff's title to the note, and the present declaration is sufficient. It is not necessary to set forth the authority of the treasurer, it is fairly implied. And if he has authority to receive, he has equally to indorse, so as to pass the title between the company and those persons to whom the note shall be passed.

The only question here is, whether the plaintiffs show on the face of the declaration, a right to sue, so that the judgment will exonerate the defendant from a second suit upon the note.

And it seems to us that producing the note, which he must do, before his judgment is perfected, and showing also the indorsement of the very officer to whom the note was made payable, and with whom it was intrusted, is sufficient. The declaration must be taken to imply that the note was delivered to the plaintiffs. The term indorsement, *ex vi termini*, imports tradition to, as well as ordering the contents paid to plaintiff.

And it seems to us that these facts are alledged in a sufficiently traversable form, and that it could be of no importance practically, to require the name of the treasurer to be set forth.

Doubtless if the suit was in the name of the corporation, it

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should be described as such, and so of the treasurer, perhaps, if made a party to a suit, he should be described more fully. As it is common to describe parties to suits, not only by name, but by their residence, and in the English courts by their proper addition. But in tracing title to a note, or bill, nothing more is ever required than to describe the history of the conveyance in the briefest manner which is intelligible. And this is sufficiently intelligible, unless we make fools of ourselves that we may seem wise. All that could be required here in describing the indorsement is, "and by them indorsed to the plaintiffs."

It is never important to describe the mode. It may be done in numerous modes, and that is indifferent. It will appear and may be met in proof. So too, it might have been said the company indorsed the note *by their agent*, without describing how the agency was created. And so equally might it be said that the agent of said company indorsed said note to the plaintiff, without describing either the agent or his authority. But if the authority is attempted to be set forth, it must not appear to be defective.

And we think a common intendment in regard to the present declaration, *ut res magis valeat*, will make it good, and we do not esteem it the duty of a court, in regard to special demurrers ever to make themselves sharp for distinction.

Judgment reversed and judgment that declaration is sufficient.

FREDERICK W. GATES *v.* CHARLES ADAMS, JAMES MORSE, SETH MORSE, MIRON MORSE, ROY BLINN, T. FOLLETT, L. FOLLETT, G. A. AUSTIN, JOHN HERRICK, H. FREEMAN, T. CONNER, W. D. KIDDER, AND LEMUEL DREW.

[IN CHANCERY.]

When Answer is to be taken as true. Important matters to be alledged. Fraud will not be presumed. Rule for apportioning Mortgage, when several parcles of land are in the mortgage.

When a case stands on bill and answer, and the answer is not traversed, the allegations which the defendant makes by way of belief, comes within the general rule, and in such case, the answer is to be taken as true.

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Important and cardinal matter in a defense should be in some way alledged, and not be left to inference, merely.

The plaintiff executed a release in these words,—"This mortgage is discharged, a second mortgage having been given of other lands to secure the same debt." It was held, that in order to have this release defeat the plaintiffs' right, it should appear that it is a fraud upon the defendants, and executed under such circumstances as to effect the plaintiff with the fraud, and if fraud is not alledged, the court will not presume it, but the contrary.

And again, if the defendants would compel the plaintiff, (when several pieces of land are in the mortgage,) to go altogether against one piece of land, they must show such a state of the title, as will enable the plaintiff to get his pay, or else charge him with the release, under such a state of facts and knowledge, as to make it express fraud upon the defendants.

If several parcels of real estate are in the mortgage, the mortgage is to be apportioned upon the land according to value, then give a time for the owner of each to redeem his portion, and upon failure to be foreclosed, and if both or neither redeem, that will end it; if one redeems his portion and the other not, then the one redeeming his own, must also redeem the other, or forfeit the whole estate; and if he does, then he is to be allowed to take the whole estate.

The case of *Howe* v. *Chittenden*, 1 Vt. 28, carries the notion of apportioning a mortgage security upon different parcels of the security, further than is altogether consistent with the rights of the mortgagee.

APPEAL from the court of chancery. The facts of the case sufficiently appear in the opinion of the court.

Phelps & Chittenden for plaintiff.

L. Underwood for defendants.

The opinion of the court was delivered by

REDFIELD, J. This is a bill for the foreclosure of a mortgage, executed by defendant Adams, on the 30th day of December, 1843. The bill alledges that on the 19th day of February, 1844, Adams conveyed a portion of the premises to the three defendants Morse, that they conveyed to Herrick a portion of the same premises conveyed to them; that Adams conveyed another portion to Herrick on the 1st day of March, 1844; that Adams conveyed another portion of the premises to Russell, 28th February, 1844, and so at different times, portions of the land were conveyed to all the defendants, praying a foreclosure of their title.

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The defendants insist, in their answer, that the plaintiff, on the first day of December, 1843, took a mortgage of Adams, upon another piece of land, to secure the same debt, which was the property of Adams, in fee simple, and which was ample security for the debt.

They further alledged, that on the 23d day of March, 1847, the plaintiff put, or caused to be put, upon the record of deeds, in the town of Burlington, the following, under his hand and seal, upon the margin of the record of the mortgage deed, and duly certified by the town clerk, the original being either upon the original deed, or a slip of paper intended to be attached to the deed.

"This mortgage is discharged, a second mortgage having been given of other lands, to secure the same debt." And whether this is, or is not, an effectual discharge of the mortgage, the defendants claim that the plaintiff be compelled to go for his debt altogether, against the land first mortgaged, or else lose it; and at all events, that the mortgage be apportioned upon the whole land according to value. The answer farther alledges, that the defendants believe the plaintiff knew, at the time he caused the release to be recorded, of the conveyances to defendants, and they also alledged that they had paid to Adams the full value of the price of the land, before the record of the release, that the conveyances to them are by covenants of title; but Adams is now insolvent, and unable to refund the money paid by them.

The case was heard in the court of chancery, on bill and answer. A question is made, to what extent the facts alledged in the defendants' answer, are to be taken as true. We entertained no doubt whatever, that allegations which defendants make by way of belief, come within the general rule, that in such case the answer is to be taken as true, and for the reason, that had the answer been traversed, the defendants would undoubtedly have been allowed to prove facts, so alledged. Any other rule then, upon this subject, would do great injustice.

In regard to the merits of the defense, there can be little doubt, that the general principles contended for by the defendants, are well founded, and that in a supposable state of facts, which seems in argument to be assumed to exist here, they would apply to the present case.

But the answers seem to us not to contain any such defense.

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The claim that the plaintiff shall lose his debt, so far as this bill is concerned, goes upon the ground, that in equity, it rested wholly upon the other piece of land. This is urged first, upon the ground that the mortgage first in time, was the primary security, to which plaintiff was bound first to look. But we do not think any such relation follows from the mere order of execution, and nothing else appears in the case, upon this point. Secondly it is urged, that if the other land is still in Adams' possession, except the plaintiff's lien, that should first be made chargeable with the debt. That is no doubt so, but we think so cardinal a matter in the defense, should be in some way alledged, and not be left to inference merely. For anything appearing upon these papers, Adams might have sold that piece of land first, and if so, it was thereby relieved from the burdens of the mortgage, the same as the defendants argued, as to themselves. And if this be so, it was highly proper the plaintiff should release that portion of the security, and go against the defendants for the whole debt; and that would make the release, imperfect as it is under the statute, no doubt good, in favor of those equitably entitled to enforce it.

But if no such state of facts exist, and no rights have accrued in faith of the release, we do not think the release could defeat any rights of these defendants to contribution, or even of the plaintiff, to go against the other piece of land, if so ordered by a court of equity. For the paper, referring his redress upon this piece, only purports an agreement to look to the other mortgage, and if the party were denied that, by a court of equity, and had executed the release, in all good faith, with the honest belief, that he could lawfully go against the other land, the mistake, as between the parties, would no doubt find a correction in a court of equity.

And if the defendants would show any obstacle to themselves, growing out of the release, and that others have acted in faith of it, they should so aver in their answers. For to have this release defeat plaintiff's right, it should appear that it is a fraud upon defendants, and was executed under such circumstances as to affect the plaintiff with the fraud. Nothing of this is alledged. And we are certainly not to presume fraud, but the contrary.

Prima facie the plaintiff has a right to go against either piece of land for his debt, and if the defendants will compel him to go altogether against one, they must show such a state of the title, as

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will enable the plaintiff to get his pay, if he does go there, or else charge him with the release, under such a state of facts and knowledge, as make it an express fraud upon the defendants. As the case now stands, the orator is entitled to have the decree affirmed.

Whether this will embarrass the defendants remedy over, they will judge. My brethren think it would not. I do not feel at all assured upon that point. I should sooner think it might. Especially, if in any event the plaintiff should have to lose his debt by reason of the release. For if the facts exist which they argue, they might require to ask a court of equity to decree plaintiff to refund the very money, which he obtains by this decree, which would look awkward.

We think the case of *Howe* v. *Chittenden*, 1 Vt. carried the notion of apportioning a mortgage security upon the different parcels of the security, further than is altogether consistent with the rights of the mortgagee. Under our practice, a sale of the premises is never decreed. All then which could be consistent with the rights of the mortgagee, is to apportion the mortgage upon the land according to value, and first foreclose the mortgage; then give a time for the owner of each parcel to redeem his portion, and upon failure to be foreclosed, and if both or neither redeemed, that will end it. If one redeems his portion, and the other not, then the one redeeming his own, must also redeem the other, or forfeit the whole estate, and if he does, then he is to be allowed to take the whole estate. This will do equity to all parties, and it is the only way it can be done, under our practice, as it seems to me.

It seems probable that the defendants, in this case, may require a cross bill, or a bill in the nature of a cross bill, to adjust this whole matter, if such facts exist as to give them an equity, and especially if the validity of that release is important, but this will depend very much upon what the facts are, and the counsel can better judge of that.

Decree affirmed with costs, unless upon terms, the defendants are allowed to amend, in the discretion of the chancellor.

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JOHN PECK, JOHN H. PECK, CASSIUS P. PECK AND EDWARD W. PECK *v.* HARMON S. BARNUM, PRINCIPAL DEBTOR, AND WILLIAM EGGLESTON, BENAJAH BARKER, HENRY V. B. BARKER AND STORM R. HAIGHT, TRUSTEES.

[Decided July Special Term, 1852.]

Trustee process as to partners. Plea in abatement. Motion to dismiss.

Members of a partnership, a part of whom reside in this State, and a part in another State, who form their partnership and carry on their partnership business in this State can be held chargeable as the trustees of one to whom they are indebted in this State.

That which goes to the whole merits of the action, cannot properly be pleaded in abatement, nor can it be tried on a motion to dismiss.

ACTION on book account, in which Storm R. Haight, Henry V. B. Barker, William Eggleston and Benajah Barker, as partners under the firm of Eggleston, Barker & Co. were summoned as trustees of the principal debtor. Judgment was rendered in the county court against the principal debtor, to which there were no exceptions.

Several questions arose at different times in the course of the trial, in relation to the liability of the trustees — the first was on a plea in abatement — the second was a motion to dismiss — the third upon facts set forth in the answer of the trustees, and the plaintiffs replication thereto.

The only question involved in each, was whether Eggleston and Benajah Barker, being resident citizens of the State of New York, at the time, and ever since the service of process upon them, could be held as the trustees of the principal debtor, notwithstanding he was at that time a resident citizen of this State, and the business in which the firm of Eggleston, Barker & Co. were engaged, was within this State, and the money due to the principal debtor from them was payable here.

Upon each of these questions, the county court decided that Eggleston and Benajah Barker were not liable as trustees, and rendered judgment for the trustees; to which the plaintiffs excepted.

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Asahel Peck and *William W. Peck* for the plaintiffs.

The answers of the trustees should have been dismissed, so far as they related to the residence of the trustees, this should have been pleaded in abatement, that an issue might have been taken thereon.

Haight and H. V. B. Barker are within the terms and object of the Statute. Rev. Stat. Ch. 29, § 4 and 46.

They are *residents*; and in case of a joint debt, and a non-residence of one or more of the joint debtors, the creditor may proceed against the resident debtor.

Then debtors may, when they have non-resident co-debtors, be charged as trustees. *Parker et al.* v. *Danforth & Tr.*, 16 Mass. 299. Stat. of Mass. of 1794, Vol. 2, p. 673. *Tingley* v. *Bateman & Tr.*, 10 Mass. 350. *Ray* v. *Underwood & Tr.*, 3 Pick. 302. *Hart* v. *Anthony & Tr.*, 15 Pick. 445. *Danforth* v. *Gray & Tr.*, 3 Met. 564. *Pettis* v. *Spaulding & Tr.*, 21 Vt. 66. *Kidder et al.* v. *Packem et al.*, 13 Mass. 80. *Hull* v. *Blake*, 13 Mass. 153. *Waller* v. *Allyn*, 22 Pick. 245. *Baylies* v. *Houghton et al. & Tr.*, 15 Vt. 626. *Chase, Grew & Co.* v. *Haughton et al., & Tr.*, 16 Vt. 594.

The non-resident debtors having been notified, may be considered as amenable on account of the *situs* of the debt, and the fact that their co-partners are residents, and summoned.

Phelps & Chittenden and *Smalley* for the trustees.

1. The decision upon Eggleston's and B. Barker's plea in abatement, was obviously correct. The statute exempts *any person* who resides without this state, without any reference to the place where the debt was contracted, and the joinder of those who are residents of the state with them, as trustees, does not take away the exemption.

2. The motion to dismiss the answer to the plaintiffs allegations was properly overruled. It was entirely unnecessary, if not improper, to plead the facts set forth in the answer in abatement, because they show the fund in the trustees hands not attachable. Any fact of this character may with propriety be stated in the answer.

The plaintiffs proposition would not only deprive both parties of the trustees statement on oath as to such facts, but result in the

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absurdity of permitting a fund to be attached, which is legally exempt.

3. The county court was right in discharging the trustees upon the facts stated in the answer and replication. It is an invariable rule, that to reach a debt due from a firm, the whole firm must be summoned in their partnership capacity — *Pettis* v. *Spaulding & Tr.*, 21 Vt. 66,— and one of two joint debtors, cannot be held without the other, for the joint debt,— *Rix* v. *Elliott*, 1 N. Hamp. 184. *Hudson* v. *Hunt*, 6 N. H. 538. 6 Mass. 60,—and rests upon the same principle as a suit between creditor and debtor, and applies with much greater force where a part of the firm are not only not summoned, but are expressly exempted by law, and this exemption is not merely personal. It is an exemption of the fund.

This is founded on the obvious reason, that as the statute can have no force without the State, the foreign trustee may be sued or summoned there at the same time he is compelled to pay it here under this process.

It necessarily results, therefore, that as the whole debt is due from all, and as the exemption is of the fund, in the hands of the foreign trustee, the whole fund is exempt.

Parker v. *Danforth & Tr.*, 16 Mass 299, relied on by the plaintiffs proceeds upon entirely different grounds. No provision exempting non-residents, exists in the Massachusetts trustee act.

The opinion of the court was delivered by

ISHAM, J. The questions in this case, arise on three bills of exceptions, which have been allowed during the progress of the trial of the case. The first is on a plea in abatement; the second on a motion to dismiss, and the third upon facts set forth in the seventh answer of the trustees, to the allegations of the plaintiffs, and the replication thereto.

The action is on book against Barnum, as principal debtor, and William Eggleston, Benajah Barker, H. V. B. Barker and Storm R. Haight, of the firm of Eggleston, Barker & Co., as trustees; judgment having been rendered against the principal debtor, no question arises on that part of the case; neither does any question arise on the present investigation, as to any actual indebtedness between the trustees and the principal debtor. For if such indebtedness exist, it is insisted that the trustees are not chargeable in

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this action. That as Eggleston and Benajah Barker were residents of the State of New York, at the commencement of the suit, the act creates an exemption of their persons, as well as of the debt, from the operation of this process. The case admits they were residents of that State, and that the other members of the firm were residents of Burlington, in this State, at which place the debts respectively accrued, the partnership was formed, and the business of the firm transacted; so that the general question arises, whether the members of a partnership, part of whom reside in this State, and part in another, can under such circumstances, be held chargeable as Trustees of one to whom they are indebted within this State.

The Compiled Statutes p. 256, gives to creditors the benefit of this process, by which the estate of the principal debtor, both real and personal, can be attached, as well as debts and claims due to him from others; and this property, so attached, can be held by the creditor for the payment of such judgment as shall be obtained against the principal debtor. This statute is remedial in its character, and should be so liberally construed that full effect may be given to the intention of the Legislature in its passage. It should be borne in mind also, that this act was passed cotemporaneously with the act abolishing imprisonment for debt. Thus while relieving the person of debtors from arrest and imprisonment on matters arising *ex contractu*, the Legislature intended to extend the remedy of the creditor, by creating a lien, under this process, upon the real and personal estate of the debtor, as well as debts and claims due to him.

It is, therefore, a matter of justice as well as propriety, that such construction be given the act, that all the effects of such debtor be held for that purpose, unless expressly exempted by its provisions. It can in no way injuriously affect the trustees, for every matter of defense, or subject of consideration, is available under this prosecution, which would be available if the matter was prosecuted by their immediate creditor. All they are required to do, is to discharge to the creditor in this suit, that obligation, they are bound to perform to the principal debtor. Under this general view of the act, it becomes the duty of the court to protect whatever lien may have been obtained by the plaintiffs under this process, unless it is in contravention of some positive rule of law.

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The 6th section provides, "That no person shall be summoned "as trustee, unless at the time of the service of the writ, he resides "in this State." Under this provision, it is claimed these trustees are not chargeable, as two of the firm were residing in the State of New York, at the time of the service of the writ, and being specially excepted from the act, all the members of the firm are likewise excepted, as none are liable to be prosecuted on this joint claim, only when all the partners are, or can be made legal parties to the record. In making this exception from the general provision of the act, it is manifest the Legislature had in view but one class of cases, and that was the case where the trustee with the rights and credits in his hands was not within the jurisdiction of this State at the service of the writ, but was a resident of another State, and subject to its laws and jurisdiction. In this respect, that provision of the act is declaratory of the common law. It was accordingly held by SEWALL, J., in *Tingley* v. *Bateman and Trustee*, 10 Mass. Rep. 350, that the trustee process, is like a process *in rem*, in which a *chase* in action is attached for the debt of the principal. That these species of effects are, for this purpose considered local, as remaining at the residence of the debtor, or person entrusted for the principal, and are not to be considered as following the person of the debtor; and that a resident of another State, is not in legal contemplation, within the process of this court, to be summoned as trustee, any more than the goods or effects of a debtor are liable to be taken by attachment while remaining deposited within the bounds of a neighboring State. The same doctrine is found in 6 N. Hamp. Rep. 497. 15 Pick. Rep. 445, and 3 Met. Rep. 564. This is also the rule in England, under the process of foreign attachment, as existing under the custom of London. 2 Chitty. Rep. 438. 3 Doug. Rep. 281.

It is to cases of that character, therefore, where all the parties reside in another State, that the application of that section of the act should be confined. It is obvious, therefore, that it can have no application to the case under consideration, where some of the trustees reside in this State, where the partnership was formed and had its place of business; and as it does not appear that the debt was contracted or payable abroad, it is to be inferred that it was contracted and payable here. Under such facts, the reasoning of Judge SEWALL will have the effect to charge the trustees, for if

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in legal contemplation, such effects are considered local for this purpose, and as remaining at the residence of the debtor, or person entrusted for the principal, then it must be considered that these effects are remaining where the partnership was formed, their business transacted, and where two of their number resided. There can be no propriety in considering them as following the persons of the absent members of the firm.

Under those circumstances, such effects are as liable to be reached by this process, as are the goods of any debtor deposited within the bounds of this State. There is nothing, therefore, in this provision of the statute that prevents the prosecution of this suit. And if any difficulty exists, it must be in the application of other principles, rendering its prosecution inconsistent with the general policy of the law, and attended with insecurity to the individuals summoned as trustees.

That there are difficulties of a general character, and some arising possibly from the want of more specific legislation applicable to cases of this kind, is not to be disputed, and which have been urged upon our consideration in the argument of the case. Among these it is said, that the statute can have no effect without the State; that the absent members of the firm may be sued in that State, for the same matters, and that a judgment in this suit against the resident members in this State, will be no bar to proceedings in another State, where the absent members reside. It would be difficult to resist the force of this objection, if the *situs* or place of business of the company was in that State, and its affairs were conducted there, by resident members of the company. In such case, the effects of the firm might with more propriety be considered as subject to the laws and jurisdiction of the State where its business was transacted. But where, as in the case under consideration, the company was formed in this State, and its affairs conducted here by resident members, its effects are local, and remain with the members of the firm, at their place of business, subject to the laws of this State, and the jurisdiction of its courts, and their adjudications are conclusive upon other tribunals, more particularly where the prosecution partakes of the character of a proceeding *in rem*. The conclusiveness of an adjudication under such circumstances, in binding the effects of the firm, rests not merely upon principles of comity, but upon the higher principles

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of sovereignty and exclusive jurisdiction. On this subject Justice STORY remarks, Conflict of Laws 463, "A nation within whose "territory personal property is *actually situate*, has an entire "dominion over it while there, in point of sovereignty and jurisdic- "tion as it has over immovable property, it may regulate its trans- "fer, subject it to process and execution, and provide for and con- "trol the uses and disposition of it, to the same extent that it may "exert its authority over immovable property." And on page 495–6, speaking of the conclusiveness of judgments upon personal property, within the jurisdiction of the court pronouncing the judgment, and when the suit is in the nature of a proceeding *in rem*, he remarks, "That the judgment pronounced is of universal "obligation as to all matters of right and title, which it professes to "decide in relation thereto. Whatever disposition it makes of the "property by sale, transfer, or other act, will be held valid in every "other country, where the same question comes directly or indi- "rectly in judgment before any other foreign tribunal — *and that* "*proceedings by way of foreign attachment against personal prop-* "*erty, or against debts in favor of creditors are entitled to the same* "*consideration*." The case of *Parker* v. *Danforth*, 16 Mass. Rep. 299, not only fully establishes this doctrine, but it was also held, that a process of this character binds the effects of a company, where their place of business was in another State, and the business was prosecuted there by some of its resident members. Whether the doctrine, to that extent, would be recognized in this State, we are not called upon to decide, but it is a very decided authority in its application to the case under consideration. In this case, therefore, we can entertain no doubt, that a judgment satisfied by resident trustees will afford all, who are jointly responsible with them, protection against any further claim, at the suit of other creditors.

The difficulties arising from the fact that any agreement may have been entered into, and liabilities incurred by the absent members of the firm, and of which those resident in this State may be ignorant, and that the actual state of the claim in relation to which the suit was commenced, may not be known before judgment,— can be avoided in the exercise of the power of the court, in delaying the rendition of judgment for such time as will enable the trustees who are parties, not only to ascertain the true condition of the claim, but the nature and extent of such liabilities as may

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have been contracted, as well as such other matters which may exist, or which can in any way be available as between them and their creditor. And by permitting them to make such further disclosures as the facts in the case may require. This view is taken of the subject by PARKER, Ch. J., in *Parker* v. *Danforth*, and in practice can lead to no serious inconvenience.

It is further urged by the trustees, that this suit cannot be sustained, as the debt due from the trustees is joint, and that they are liable to be prosecuted in this form of action, only when all the debtors can be, and are, made parties to the suit; and that no provision is made in the statute by which proceedings can be had only where the whole firm is summoned in their partnership capacity. It was held in the cases of *Rix* v. *Elliott*, 1 N. H. Rep. 184, and *Hudson* v. *Hunt*, 6 N. H. Rep. 538, and 6 Mass. Rep. 60, that one joint debtor could not be held as trustee, without joining the others. And this is unquestionably correct, in all cases, as it was in those, where all the debtors lived within the State, and the process might have been served upon all. This is the rule at common law, in all cases where a joint claim is enforced by legal process.

The Compiled Statutes, p. 227, Sec. 60, 62, provides that on joint contracts, where one or more reside out of the State, an action may be sustained thereon, against those residing in this State, and that a judgment in such suit, remaining unsatisfied, shall not discharge those who are resident abroad. All such actions may be commenced by attachment or summons; p. 242, Sec. 1; and when commenced by summons, service of the process can be made under the provisions of the same act, p. 244, Sec. 16, by delivering to the resident debtors, or leaving at the house of their usual abode, an attested copy. Under these several provisions, Barnum, the principal debtor in this suit, could have commenced his action by summons, against the firm of Eggleston, Barker & Co., and caused service to be made on those members of the firm who were resident in this State, and proceeded to judgment and execution against the partnership effects. The trustee act in this respect, subrogates the plaintiffs in this suit, to the rights of Barnum, the principal debtor, against the firm of Eggleston, Barker & Co. This was the evident intention of the Legislature in giving to creditors the benefit of this process, and in giving the right, they

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gave those incidents necessary to obtain and enjoy that right. Thus the trustee act, p. 257, Sec. 10, provides that this process shall be served on the principal debtor, "and shall be further "served on each of the trustees, *in the manner prescribed for the "service of the writ of summons.*" As the writ of summons at the suit of Barnum could be served on the members of the firm resident in this State, and thereon could proceed to judgment and execution against the partnership effects, so the same mode of service is allowed in this case, to bind the firm to the extent of their indebtedness to Barnum, the principal debtor.

In the case of an individual or joint debtors, where all have their residence in another State, they cannot be summoned as trustees, not only on the ground that they are subject to another jurisdiction, but our statute has made no provisions for the service of process in such case; the 16th Sec. of the act, p. 244, applying only to cases where their residence is in this State. But provision is made in case of joint debtors, where some of them reside and are within the jurisdiction of this State and its courts. We think, therefore, that a suit of this character can be sustained against the members of a firm, part of whom reside in another State, where the company was organized in this State, and where its business is transacted here by resident members.

In the application of these principles to the various exceptions which have been allowed in this case, our attention is to be directed in the first place, to the exceptions allowed on the pleas in abatement. These pleas were respectively filed by William Eggleston and Benajah Barker, two of the firm of Eggleston, Barker & Co. They have severally plead that at the time of the service of the writ, they were not residents of this State, but had their residence in the State of New York. Virtually, therefore, it is a plea to the jurisdiction of the court, and on which the suit, as to them, was abated. Independent of the question which the parties desired to present to the court in that form, a difficulty arises from the fact that the subject matter of the plea is not adapted to a plea on abatement. Its tendency is not to defeat the present proceeding merely, but to show that no action of this character can be sustained. In the case of *Jones* v. *Winchester*, 6 N. H. Rep. 498, a similar plea was filed by the trustee; and the court holding it a plea to the jurisdiction, use this language in their decision,—

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"That the plea is clearly bad. A plea to the jurisdiction of the "court in a transitory action is proper, where some court in the "State has jurisdiction, but not the court in which the action is "brought. But in this case the action is brought in the proper "court, if any court in the State has jurisdiction." The same doctrine has been held in the courts of Massachusetts, and for the same reason — 3 Mass. Rep. 24. 5 Mass. Rep. 362.

The judgment of the court in sustaining this plea in abatement, must be reversed.

The 2d bill of exceptions is founded on a motion to dismiss the 7th answer to the plaintiffs' allegations and the judgment of the court in overruling the same.

This answer was filed on the part of those trustees who were resident members of the firm in this State, and they insist that they cannot be held chargeable as trustees in this suit, inasmuch as other members of the firm resided out of the State, and had been discharged.

It is urged that this answer should have been dismissed because the facts were not plead in abatement, nor set forth in their disclosures. But for the reasons which have been stated, the matter was not a cause of abatement, and could not have been so plead, neither was it necessary that they should have set it forth in their disclosures; for the legitimate object of a disclosure is to set forth the facts upon which the question of indebtedness arises. If there are other facts upon which the trustees claim to be discharged, they may make such allegations, independent of their disclosures, and upon which testimony may be taken by the parties, and the case submitted to the court and jury. But the legal effect of facts so alledged, can never be tried on a motion to dismiss. For if such motions were entertained, it would be in the power of the party making such motion, to take every such case with its testimony from the consideration of the jury. The view entertained of this subject, in short, is this — that the defense, if available, goes to the whole merits of the suit, and should be presented either upon the disclosure or such allegations and pleadings as go to the action, and upon which issues can be properly formed, testimony taken, and trial had by the court or jury. The motion to dismiss was therefore properly overruled, as the defense which the trustees desire to make, does not constitute a proper foundation for such a motion.

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The merits of the whole case, therefore, rest upon the 3d bill of exceptions, which stands upon a demurrer to the replication to the 7th answer of the trustees, and on which the court adjudged the replication insufficient, and discharged the remaining trustees from the suit. On these exceptions the general question in the case arises, and which we have endeavored properly to consider, and from the investigation which has been given to the case, we feel that the general policy of the law in relation to the liabilities of trustees, and the rights of creditors in seeking payment of their claims, under this process, demand the construction of the act which has been placed upon it. That the creditors in this suit have a right to proceed against the resident members of this firm, and charge the effects of the company to the extent of their indebtedness to the principal debtor. And also to proceed against the foreign residents of the firm, if they see fit to waive their territorial right of exemption by entering an appearance.

The result, therefore, is that the judgment of the court discharging the trustees, must be reversed, and that they must answer by making disclosure.

HENRY W. CATLIN *v.* N. PRESTON SMITH.

Consignment. Sales. Usage.

Where A consigned merchandise to B, to sell on commission, with instructions to "sell for cash, or not on credit," and B sold and delivered the goods to a person who said he would pay for them in a few days, which promise he renewed from time to time, at intervals of two or three days, for two or three weeks, when he failed. In an action by A against B, to recover the value of the goods,— held, that B could not show in defense, a custom by which such sale was considered a cash sale.

ACCOUNT. The Facts in the case sufficiently appear in the opinion of the court.

Kasson & Edmunds for plaintiff.

Salmon Wires and *W. W. Peck* for defendant.

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The opinion of the court was delivered by

REDFIELD, J. The defendant is a commission merchant in Boston. The plaintiff being in Boston, left certain produce with defendant, to sell for a commission of two-and-a-half per cent., with instructions to "sell for cash, or not on credit," and by this we understand that he said what was equivalent to either, or both expressions. The defendant sold and delivered the goods to some person, who said he would pay for them in a few days, and this promise he renewed from time to time, at intervals of two or three days, for two or three weeks, when he failed and stopped business. Nothing has ever been realized by the defendant. The auditor reports, that this sale was what is called, among commission merchants in Boston, a cash sale, and that according to their custom, the defendant was guilty of no negligence, or departure from instructions.

The county court disallowed this item in the plaintiff's account.

The question now is, whether it was rightfully, or not, disallowed.

It is undoubtedly true, that this contract, being made in Boston, and there to be executed, is to be judged of by the laws of Massachusetts. The case of *Clark* v. *Van Northwick*, 1 Pick. 343, is relied upon as showing that, by the law of that State, this sale is regarded as conforming to such instructions as were here given. But it must be remembered, that that case was a New York transaction, and strictly speaking, only shows the law of New York. From what is there said of a similar custom prevailing in Boston, and the same custom being allowed to govern a similar contract in New York, there is perhaps, little doubt that the court there would have made a similar determination in regard to the law of Massachusetts, had it become necessary. But no such decision was made, and it does not appear that any such decision has ever been made by their court, in regard to the law of Massachusetts.

And judging from the cases read in argument, it seems to us, that the New York courts have not recognized any such law, but the contrary. The case of *Leland* v. *Douglass*, 1 Wend. 490, in effect decides this. The offer there, was to show that in the New York market, such sales as these are regarded as cash sales, although in fact made on a credit of two weeks, or more; and that instructions to sell for cash, imports a sale on credit of this kind,

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and if the factor uses due diligence to collect, he is not liable. In this case, if the custom could have been regarded as qualifying the instructions, it would have brought the case within the declaration, and should have been received. But the Supreme Court held that this evidence was properly rejected at the Circuit Court. And the case of *Bliss* v. *Arnold*, 8 Vt. 252, is an express determination of this court, that such is not the law of New York. We have no other express decision in regard to this custom any where, except in the case of *Barksdale* v. *Brown*, 1 Nott. & McCord, 517, referred to in the very accurate note, in 1 Smith's Leading Cases, 498 *Wigglesworth* v. *Dallison*, where the custom was disregarded as inconsistent with the terms of the contract.

It is obvious, then, that the preponderance of express authority upon the subject, is rather against the existence of such a rule of law, any where. But it may be claimed to be so far consonant with established general principles, that it ought to be regarded as law every where.

In regard to this view, it is no doubt true, that custom, or usage of particular trades, in particular places, is, of necessity, very often resorted to in courts of justice, for the purpose of determining the extent of the obligation of contracts, their import and interpretation. Many strong cases of the application of this rule, will be found in the English note to *Wigglesworth* v. *Dallison*, *ubi supra*; some perhaps, coming quite or nearly up to the present. It is thus stated, "That evidence has been received to show, that by the custom of a particular district," one thousand rabbits, mean twelve hundred rabbits. *Smith* v. *Wilson*, 3 B. & Ald. 728. But the general current of the cases fall very far short of this. The general rule, in regard to the admissibility of usage, requires that it should be reasonable, certain, and consistent with the general known import of the words used in the contract, to which the usage is to be applied.

And in our judgment, the application proposed to be made of this usage, is essentially deficient in all these particulars. Its uncertainty alone, might not prove a fatal objection, but a range from one day to three weeks, is surely a most convenient uncertainty! Such an one, as we are slow to believe, ever exists among business men of character, except in extreme emergencies. The reasonableness of this usage, and its consistency with the terms of the in-

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structions, depend upon the same considerations. No rule is better established, than that an express contract cannot be controlled by any custom or usage, local or general. This is a cardinal point, running through all the cases upon this subject. That is the case of *Yeates* v. *Pyne*, 6 Taunt. 445, where it was held that a contract for prime singed bacon, could not be controlled by an usage in the bacon trade, to admit under that description, bacon more or less deteriorated, according to a certain rule, called "average taint." And this is but a fair example of all the best considered cases upon this subject. It will not be questioned by any one, I suppose, that the defendant was bound to follow instructions, the same as if he had expressly so stipulated. And it can make no difference whether the contract is in writing, when we learn its exact purport, as in the present case. That being so, nothing short of an express determination upon the very point, could ever raise any doubt in our minds, that, upon due consideration, the Massachusetts court will never determine, that in a case like the present, by the law of that State, this defendant is not liable for this portion of the account. It is scarcely possible to make a contract more explicit than the present, or to conceive of any usage more explicitly subversive of its very essence, than the one reported in this case by the auditor. If any sale ever was a sale, upon credit, this was one. And if any man ever could violate his duty of faithful agency, by departing from instructions, it was done in this case.

Judgment reversed, and judgment for plaintiff for the largest sum.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF FRANKLIN,

JANUARY TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

H. B. FARRAR *v.* EPHRAIM BESSEY AND WIFE.

Book Account. Husband and Wife. Statute of limitations.

The wife, after marriage, and while living with her husband, is incapable of contracting a debt against herself, nor can she claim the benefit of credits upon a debt that she contracted before her intermarriage, except as payments made by her husband upon her debt.

A *feme covert* cannot make a promise express or implied, in her own right, while living with her husband, to remove the Statute bar, and if after her intermarriage she makes part payment of a debt contracted before marriage, it will not constitute an implied promise, so as to take the account out of the Statute if the six years has run.

And no promise of the husband, which can affect the rights of his wife, under the Statute of limitations, can be implied from part payment, by him, of a debt contracted by his wife, while *feme sole*.

BOOK ACCOUNT. The action was commenced before a justice of the peace, and came to the county court by appeal. Judgment

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to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows:

The plaintiff's account was not disputed, but the defendants relied upon the statute of limitations, for defense. It appeared that two credits were made upon the plaintiff's books within six years, for services of the defendants' wife, and that the plaintiff and defendants agreed that the same should apply on the account against the wife of the defendant Bessey, contracted before her intermarriage with the said Bessey; that the plaintiff and defendants, before, or at the time the services were rendered, agreed that it should be applied in part payment of the account, as before stated.

Upon these facts, the county court rendered judgment for the defendants upon the report. Exceptions by plaintiff.

N. L. Whittemore for plaintiff.

1. A credit on an account, within six years, is evidence that there is an unsettled subsisting account between the parties, and the law will infer a promise to pay the balance thereon due.

2. After six years, the law will presume a debt paid, and any acknowledgments of the party that the debt is not paid, will remove that presumption, and a promise to pay will be inferred unless the debtor express an unwillingness to do so, and the party recovers on the original promise. *Barlow* v. *Belamy*, 7 Vt. 54.

3. A *feme covert*, being a party defendant, is competent to make such part payment, or such acknowledgment; and there is no reason why the law should not raise a promise on her part to pay the balance, and when the husband is present, and consenting to such payment or acknowledgment of the wife, there can be no hardship in rendering him liable also.

4. An acknowledgment that a judgment is due within eight years will remove the statute bar, but the party does not recover on the new promise, but upon the record. *Olcutt* v. *Scales*, 3 Vt. 173.

Stevens & Edson and *I. B. Bowdish* for defendants.

In this case, the defendants contend,

1. That the husband could make no promise which could bind the wife.

2. That the wife can make no promise or contract which will

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bind the husband, as to debts contracted before her marriage. *Powers* v. *Southgate and wife*, 15 Vt. 471.

3. That part payment is only evidence that defendants acknowledged the debt, and if the acknowledgment of either will not bind the other, neither will part payment.

4. That if defendants agreed that the labor of the wife should apply in payment of the wife's debt *dum sole*, yet from the auditor's report, it appears that plaintiff did not acquiesce in such application, until more than seven years after the services were rendered, and therefore, if not acquiesced in by the plaintiff, is not binding. The auditor finds the services were rendered in July, 1843, and credited, August, 1850.

The opinion of the court was delivered by

ROYCE, Ch. J. This was an action of book account, brought to recover a balance claimed to be due from the wife. The whole of the plaintiff's account, except one item of fifty cents, on the *debit* side, and two items of credit, amounting to two dollars and fifty cents, accrued before the intermarriage of the defendants. They presented no account before the auditor, but relied on the statute of limitations. To this defense two answers were attempted before the auditor, but only one of them is now insisted on. This is based upon the fact, that the three items referred to accrued within six years before the commencement of the action. And these entries are found to have been justified by real transactions between the parties. But the report shows, that this part of the account accrued after the defendants had intermarried. When it accrued, the wife was no longer capable of contracting a debt against herself, nor was she entitled to claim the benefit of these credits, except as payments made by her husband upon her debt. In legal effect, this part of the account arose between the plaintiff and the husband alone; so that the account properly existing with the wife, was not brought down to a time within the six years. *Gay et ux* v. *Estate of Rogers*, 18 Vt. 342. It is found by the auditor, however, that the services of the wife, which constituted these two items of credit, were, by the express consent of both defendants, received to be applied in part payment of the previous account against the wife. They must have the application which was then intended. And the general rule is, that the admission

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of a debt by part payment, is sufficient to warrant the implication of a new promise to pay the unsatisfied balance. *Strong* v. *McConnell*, 5 Vt. 338. *Joslyn* v. *Smith*, 13 Vt. 353. *Munson* v. *Rice* and *Sanderson* v. *Milton Stage Co.*, 18 Vt. 53–107.

But to authorize the implication of such new promise, from part payment, or other acknowledgment of a debt, the party whose promise is to be *implied*, must be legally capable of making a valid and binding *express* promise. And as a *feme covert* cannot make such a promise in her own right, especially while living with her husband, it follows that no effectual promise of the wife can be implied in the present case, from the fact of this part payment of her debt. This is a legitimate and obvious conclusion, from the doctrine held in *Pittam* v. *Foster et al.* 8 C. L. R. 67. And we think it must, from the decision of this court in *Powers* v. *Southgate and wife*, 15 Vt. 471, that no promise of the husband, which could affect the rights of his wife, under the statute of limitations, was to be implied from the payment made by him. The cause of action against the wife, was therefore barred; and the present suit, founded on the assumption of her continuing liability, could not be sustained. The judgment of the county court is accordingly affirmed.

A. J. Soule v. Patrick Dougherty.

Book Account. Agency.

If A purchases a quantity of goods and intrusts them to B, to sell, (as the property of A,) but gives B no authority to purchase in addition to those delivered, and B assumes the authority to purchase goods in the name and on the credit of A, by so doing B exceeds the powers of his agency, and A is not liable to the vender, for the goods thus purchased.

And where the agency has terminated, except for the purposes of rendering an account to the principal, and the agent, without any necessity to justify an extension of his powers by implication, and without the knowledge or consent of the principal, commences suits in the name of the principal, upon notes or demands taken by him in the principal's name, the agent exceeds his power, and the principal is not liable for the costs that accrue upon the said suits.

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And where the debtors were committed to jail upon the suits thus commenced by the agent, and the principal discharged them from imprisonment, it was held,—even if the principal, by this act, had created a liability against himself, that book account was not the appropriate remedy to enforce the liability thus created.

BOOK ACCOUNT. The action was commenced before a justice of the peace, and came to the county court by appeal. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows:—

The plaintiff presented the following account:—

PATRICK DOUGHERTY TO A. J. SOULE,		DR.
1. April 19, 1850, to 19½ doz. Eggs, at 10 c.		$1,95
2. " " to 3 doz. Pipes,		15
3. " " to ½ doz. Tumblers,		50
		$2,60
By Cash,	$2,10	
		50
4. July 22, Fees on three writs, you v. Flinn and others,		8,55
5. Sept. 25, Fees on two Exs., you v. John Sherman and John O'Brian,		6,36
		$15,41

As to the first three items of the account, it appeared that the articles amounting to $2,60, were bought at one time by Thomas Dougherty, the brother of the defendant, and without the defendant's knowledge or authority expressly given. That the defendant purchased a quantity of goods of one Loomis, and delivered them to Thomas, to sell, upon an agreement with Thomas, that the goods should be, and should be called, the property of the defendant, that Thomas should sell them in the name of the defendant; that Thomas might have the avails and profits of the goods, provided he paid Loomis for the goods, otherwise not.

Thomas sold out the goods in the name of the defendant, but never paid Loomis for them. He began to sell the goods in March, 1850, and ended the business the 8th day of May, following. He had no authority from the defendant to buy goods and make the defendant chargeable therefor. On the 19th day of April, 1850, he assumed such authority and made the bill of the three first items with plaintiff.

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As to the 4th and 5th items of $8,55 and $6,36, the auditor finds that these were for officer's fees for service of writs, for arresting and committing to jail the defendant's debtors, upon suits commenced by M. Scott against them, in the name of the defendant, at the request of Thomas Dougherty, without the knowledge of defendant. The auditor found that the defendant was residing within three or four miles of the place where the goods were sold, at the time the suits were brought, and within about six miles of the office of M. Scott. That the agency of the said Thomas was ended when the said suits were brought, and that said Thomas had no agency for collecting the debts, and that no necessity existed, in order to save said debts, to commence said suits instantly, and without taking time to consult the defendant. That defendant was informed, a few days after said suits were commenced, that the same were pending in his name, that defendant done and said nothing about them.

That judgments were obtained in said suits, and executions issued. That defendants Sherman, Flinn and O'Brian were committed to jail, and that the defendant discharged them from jail, by a writing to the officer, saying that he might discharge the defendants from imprisonment, as he had no debts against them.

The county court, February term, 1851,— BENNETT, J., presiding, rendered judgment for the plaintiff to recover of the defendant, items 4 and 5, charged in plaintiff's account, and interest upon the same, and disallowed the balance of fifty cents upon the three first items. Exceptions by defendant.

H. B. Smith and *C. Beckwith* for defendant.

If Thomas had a right to collect the debts *for his own benefit*, he cannot make the defendant liable for the expense. But the better conclusion is, that no such agency, nor an agency of any kind, remained in Thomas, after the 8th of May.

The happening of any subsequent event cannot give the plaintiff a right to charge on book. *Slason* v. *Davis*, 1 Aiken 73. *Nason* v. *Crocker*, 11 Vt. 463.

Hubbell & Bouge for plaintiff.

1. Thomas Dougherty had full authority to use the name of the defendant in the management of his store — the goods were the

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defendant's until paid for; and his interest required that the debts accruing for the goods, should be collected, to make up the necessary amount to pay him.

2. The plaintiff, being a public officer, was bound to receive and execute the precepts when presented. He could not stop to settle the private agreement between the nominal plaintiff and third persons. It was not competent nor according to common usage, for him to demand his fees in advance. His proper course was to receive and execute the precept, and charge his services to the defendant, who was the party of record.

3. The fact that the defendant exercised control over the matter, by discharging the debtors from jail, is also an important one in the case.

The opinion of the court was delivered by

ROYCE, CH. J. In denying the right of the plaintiff to recover for the goods charged in his account, the court below were clearly right. There was no color of authority for taking up the goods on the credit of the defendant. The remainder of the account consisted of the plaintiff's fees, as an officer, upon certain writs and executions, issued in the name of the defendant, against the signers of the notes taken by Thomas Dougherty. And the general question is, whether the defendant became legally responsible to the plaintiff for those charges.

We learn from the auditor's report, that Thomas Dougherty was the defendant's agent for the purpose of selling certain goods, which the defendant had purchased on credit of one Loomis. This appears to have been the extent of the *agency*, although there was a further provision in the contract, by which Thomas could entitle himself to the avails of the goods, provided he paid the defendant's debt to Loomis. Any act of Thomas within the scope of his agency for selling the goods, should accordingly be referred to his employment as agent, and treated as the act of the defendant. But if anything was done by Thomas beyond the proper limits of that agency, and for the purpose of enabling himself to pay Loomis, and thereby to purchase the defendant's interest in the avails of the goods, it should be referred to the latter branch of the contract, and considered as having been done in his own right; or, at least, with a principal view to his own advantage.

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That the agency of Thomas Dougherty authorized him to sell the goods on credit, and take notes from the purchasers in the manner he did, if he acted with a due regard to the defendant's interest, is undoubtedly well settled—2 Kent 622, Smith's Com. Law, 105. Paley on Ag. 26. But the question arises, whether he had authority from the same source, and under the circumstances appearing in the report, to attempt the collection of the notes by suit. In the first place, it would seem that his agency, strictly considered, had terminated, except for the purpose of rendering his account, before he caused the suits to be instituted. It is found that he completed the sales in May, and the suits were commenced in July, after. At that time his apparent duty, as a mere agent, was simply to surrender the notes to the defendant. In the next place, though the agency should be deemed to have continued, yet a collection of the notes, *by the prosecution of suits upon them*, was not within the terms of it; nor is such a proceeding ordinarily understood to come within the powers or duties of an agency to sell. Neither was there in this instance, any pressure of circumstances, as in *Davis* v. *Waterman et al.*, 10 Vt. 526, and *Felker* v. *Emerson*, 16 Vt. 653, which justify an extension of the agent's powers by implication, on the ground of necessity. The defendant was living in the vicinity, and if Thomas designed to act in the character of an agent, it was his obvious and imperative duty to obtain the defendant's consent to the course pursued, before it was resorted to. Hence we conclude that, in the sole capacity of agent, Thomas was not authorized to commence and prosecute the suits. At the same time, we think it sufficiently apparent that his purpose in those proceedings, was not to execute a mere agency, but to secure the benefits of the special provision in the contract with the defendant. It may, indeed, have been expected, that Thomas would use the avails of the goods, as means of paying Loomis; and to such an appropriation of them, the defendant's license should perhaps be implied. But as it was optional with Thomas whether to act at all upon this part of the contract, it would be most unreasonable to hold that, in attempting to execute it, he could subject the defendant to expense without some corresponding benefit. And the suits having been productive of no actual benefit to the defendant, the costs and expenses incurred could not regularly constitute the ground of any legal claim against him.

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It appears that judgments were recovered in the suits, and the debtors committed to jail, upon the executions; and it only remains to inquire how the case was affected by the act of the defendant in releasing the debtors from imprisonment. That act was evidently not intended as a ratification, but rather as a disavowal of what had been done. It must be considered, however, that the defendant thereby discharged the debts, so far at all events, as his own interest could ever be concerned. And perhaps by the same act, he also created a liability to some extent against himself. That would probably depend upon the pecuniary responsibility of those debtors. But the action of book account cannot be an appropriate remedy, even in favor of Thomas Dougherty, to enforce the liability thus created; and much less, in favor of those persons who performed service or expended money at his request, in the attempted collection of the notes. To hold the action maintainable in the former case, would be to carry the qualifications of the rules laid down in *Slason* v. *Davis*, 1 Aik. 73, much further than they have ever been extended; and to sustain the present suit, would be, moreover, to recognize this form of action as available, even where no legal privity of contract exists between the parties.

The judgment in favor of the plaintiff on the report is therefore reversed, and judgment entered for the defendant.

Administrators of Gardner G. Smith and others *v.* the Administrators of Jonathan Wainwright.

[Decided at the Circuit Session, June, 1852.]

[In Chancery.]

Bill in Equity. Equitable Jurisdiction. Set-off. Bond. Penalty. Damages. Practice in Equity.

The decease of a party an obligor in a bond, and also the holder of notes given by the obligees in the same bond for the same consideration upon which the bond was given, and the mere representation of his insolvency, his estate being con-

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fessedly solvent, is no reason why a court of equity should interfere in favor of the obligees, and decide that the amount of the notes should be set off against the sum due on the bond, and render a decree in favor of the obligees for the balance, if any. But if the obligees in the bond, being the makers of the notes, are insolvent, a court of equity will interfere in favor of sureties who signed the notes upon the security of the bond, and will decree a set-off of the amount due on the notes against what was due on the bond. The consideration that the nominal parties to the contracts are not strictly mutual, is not a valid objection to decreeing a set-off in equity, if the real parties upon whom the burden is ultimately to fall, are the same.

Where S. and others bought of W. his interest in, and good-will of, the manufacturing and sale of certain articles, within a certain district, and gave notes to the amount of $8000 therefor, and W. at the same time executed to S. and the others a bond "in the penal sum of ten thousand dollars," conditioned to be void "if the said W. shall hereafter wholly refrain from manufacturing and vending," &c., and a breach of said condition by W. was proved; *held*, that under the circumstances of the case, the sum so named in the bond was a penalty, and not liquidated damages.

The refusal of the chancellor in the court below to allow a party to file a supplemental bill before the original one comes to a hearing, is not a final decree, from which in the first instance, an appeal lies; nor is it strictly revisable in the superior court, being a matter of discretion.

But where such refusal proceeds upon special grounds, which are shown to have been misapprehended, the party, after correcting this misapprehension, will be permitted to renew his application.

Where a bond is executed to three persons jointly;—their assigns, administrators, &c., not being named in the bond,— their interests being also joint as purchasers of the business of the obligor of the bond, and the nature of the covenants showed that they were not founded upon any personal confidence in the three persons to whom the bond was executed, and where both parties expected the bond to enure for the benefit of the business sold out, and where the obligor had repeatedly assented to his liability after a change in the parties to whom the bond was executed, a court of equity will hold the obligor liable on his bond, not only for damages accruing from breaches thereof while the original parties to the bond remained unchanged, but for those from breaches after the change of parties.

APPEAL from chancery. The facts of the case sufficiently appear in the opinion of the court.

B. H. Smalley and *A. O. Aldis* for the orators.

E. D. Barber and *J. & J. G. Smith* for the defendants.

The opinion of the court was delivered by

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REDFIELD, J. This bill is brought by Gardner G. Smith, Seth P. Eastman, Abel Houghton, John Smith, Henry Adams, and Francis J. Houghton. The bond, upon which the orator's claim is predicated, was executed to Gardner G. Smith, Seth P. Eastman, and Horace B. Foster, on the 9th day of June, 1841, to secure to them Wainwright's good will in the sale and manufacture of iron castings, stove pipe, tin ware, &c., in the counties of Franklin and Grand Isle, and a defined portion of the Province of Canada, and to exclude Wainwright from all manufacture or trade in such article within the aforesaid district. Wainwright's bond is in the penal sum of ten thousand dollars, conditioned to be void "if the said W. shall hereafter wholly refrain from manufacturing or vending," &c.

A good deal is said in the bill, which might look like an inducement to a charge of fraud in Wainwright in obtaining the sale, by representing his "good will" in this trade as being of more value than it was. But taking the bill altogether, it seems, that these allegations are introduced rather to show the high value placed upon this "good will" by the parties, and that it was considered a chief inducement towards the trade upon the part of Smith and others.

The bill then charges, that the ten thousand dollars was understood and agreed damages between the parties, to become an absolute debt due the obligees, upon the slightest failure to perform on the part of Wainwright.

The bill then prays, that the notes given by the obligees for the purchase of Wainwright's stock in the trade and the good will of the business, amounting originally to some eight thousand dollars, a portion of which has been paid, may be surrendered and applied towards the sum due upon the bond, and the estate of Wainwright be decreed to pay the balance to those entitled to receive it, being a portion of the orators.

The breach alledged in the bill, is the carrying on the business of vending, within the prohibited limits, both by Wainwright in his lifetime, and by the administrators, in that capacity, since his decease. But it is not claimed, that there is any evidence of any act of sale by the administrators in the prohibited district. That is all which requires to be said upon that part of the case.

At the bringing of the bill, and before the death of Wainwright,

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the partnership of the obligees, after being twice changed, was finally dissolved in August, 1844, and Gardner G. Smith became sole proprietor in the business; and he, or his estate, has been solely interested in it, since that time. Foster, one of the original purchasers and obligees in the bond, sold out to his associates, September 27, 1841; Francis J. Houghton bought into the concern, as from the beginning, as is alledged in the bill, 26th August, 1842, and Houghton and Eastman finally sold out to Smith, in January, 1844, and the partnership was closed up and dissolved in August, 1844.

Henry Adams, John Smith and Abel Houghton have at different times, signed the notes to Wainwright, as sureties, either for the original purchasers, or for those who subsequently came into the concern.

The only reasons urged in the bill, for applying to a court of equity, are the decease of Wainwright, and his estate being represented insolvent, and the allegation, that the sureties signed in faith of Wainwright's faithfully performing the condition of his bond, and that without that they would not have signed without security.

This last reason does not seem to us to amount to much any way. In the first place there is no proof whatever, and no reasonable probability, that these sureties made a principal reliance upon Wainwright's bond, as a leading motive for assuming the obligation of suretyship. It doubtless formed an ingredient, (operating more or less upon the different persons,) constituting, with numerous other things, the consideration, or compound motive force, inducing them to become sureties. But there remain two serious objections to the interference of a court of equity, upon this ground, even if it were an acknowledged fact that this bond formed the chief motive to the sureties to become such: 1. There is an obvious want of privity, in regard to this bond, between the sureties and Wainwright, which would, under ordinary circumstances, render it unreasonable to require Wainwright to litigate the matter with parties so remotely related to him in the original transaction; and 2. There is on the face of the thing, an apparent adequate remedy upon the bond itself, in a court of law, which would induce a court of equity, the more to hesitate, in extending its functions to embrace matters not obviously and primarily within its acknowledged jurisdiction.

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The only remaining ground of equitable interference, stated in the bill, is the decease of Wainwright and the representation of insolvency. On a motion for leave to file a bill, in the nature of a supplemental bill, before the court of chancery, it was ruled by that court that the facts proposed to be added, viz., the insolvency of the principal signers of the notes, and upon whom the primary obligation of payment rested, was not important to the plaintiff's case. So that if this court deem those facts important, they are to be taken as virtually in the case.

Whatever is said in the case, then, in regard to Wainwright's representations to induce the trade, being laid aside, as not in themselves amounting to any distinct and tangible fraud; and secondly, as being virtually merged in, and superseded by, the bond which was executed by Wainwright, and above all, as forming no distinct ground upon which relief is claimed in the bill; we have remaining, the decease and representation of insolvency of Wainwright, and the decease and insolvency of Gardner G. Smith, upon whom, in equity, the ultimate primary obligation to make payment of these notes rests, and possibly of some other of the original principals, who have now become sureties, for the estate of G. G. Smith, although, as between themselves and their sureties, they must still stand as principals. And we must regard the sole object of the bill to be to obtain a set-off of whatever sum is due upon the notes against the sum due upon the bond, and a decree for the balance. For although the bill contains the general prayer for relief, it points to no other relief but a set-off, and there is nothing in the case showing any ground or pretence for any other relief. To examine the case in this view:—

1. This set-off is claimed upon the sole ground, that the ten thousand dollars named in the bond as the "penal sum," are in fact liquidated damages, to become due to the obligees absolutely, and at once, upon the slightest breach of the condition of the bond. This is the sole and exclusive basis upon which the offset is prayed. It seems in the outset, not to have been supposed, that an offset would be likely to be decreed of a mere unliquidated sum in damages, until it should become liquidated by the verdict of a jury, or in some other mode, known to the courts of common law, or agreed by the parties. We infer that this was the view taken of the case by the counsel of the orators at the

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time of framing their case, because the bill does not even present the alternative of the court regarding the damages as unliquidated, except as it may be regarded as included probably under the general prayer for relief. And it seems to be well settled, at law, that if the claim rests in mere unliquidated damages, it cannot be set off, but a sum agreed, as liquidated damages, may. Chitty on Contracts, 844, and cases cited in note; *Gillett* v. *Mawman*, 1 Taunt. 137.

2. Upon the question, whether the ten thousand dollars named in the body of the bond are to be regarded as liquidated damages, or in the nature of a penalty, the cases may not be found altogether consistent with each other. But it seems to us that there can be no reasonable ground of doubt as to this particular case. It is expressly declared to be a penalty in the contract itself, which, although not conclusive altogether, seems to be regarded as nearly so, in one view, *i. e.* where the sum is declared to be a penalty; although the converse does not always hold equally, when the sum is declared to be agreed damages. But where the sum stipulated is expressly denominated a penalty, or a penal sum, I find no case where it has been held liquidated damages, or where any doubt has been entertained upon the subject, except as between landlord and tenant. *Jones* v. *Green*, 3 Y. & J. 304. The case of *Farrant* v. *Olmins*, 3 B. & Ald. 692, cited by plaintiff's counsel, is of this character; and so also, what is said by Comyn, in his Landlord and Tenant, 324, 325, also referred to by plaintiff's counsel. The only remaining case, to which they have referred us, in support of their claim to treat the ten thousand dollars named in the bond of the intestate, as liquidated damages, is *Pierce* v. *Fuller*, 8 Mass. 223. This case in some respects, favors the plaintiffs' claim, inasmuch as it was an agreement to refrain from opposition to plaintiffs' business. But the sum fixed there, was of a character to show that the parties had pared it down to stipulated damages, being two hundred and *ninety* dollars, if defendant should run a stage on a particular road.

There are some other cases, not referred to in the argument, which go to show that the courts in this country and in England, incline to treat these contracts for the sale of the good will of a particular business, or an agreement to refrain from the exercise of a given business, in a specified district, as fixing the quantum

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of the damages to be recovered for breach of the contract, where the terms made use of by the parties will reasonably bear that construction. *Dakin* v. *Williams*, 17 Wendell, 447; and *Williams* v. *Dakin*, 22 Ibid. 201, is where the plaintiff gave three thousand dollars for the good will of a newspaper establishment, and five hundred dollars for the type and printing apparatus, and took a bond from the venders, not to publish or aid in publishing a rival paper, and upon failure, to pay three thousand dollars. This was very justly held to be liquidated damages.

But in the case before us, the property sold, seems to have been fixed at what was esteemed its fair valuation, and we do not learn that any thing specific was added for the good will. And the whole sum paid was only about eight thousand dollars, and the bond is ten thousand dollars. And while we must at once perceive that the bond was an important consideration in inducing the bargain, without which one could scarcely be induced to buy the remnant of a long trade at any price, and that it might have very considerably increased the price paid, still there is no pretence that the parties could have considered the sum of ten thousand dollars, as liquidated damages for a single violation of the obligation, or even for a continued violation thereof. And in fixing a construction upon the contracts of the parties, we are bound to do it with reference to the surrounding circumstances.

The recent case of *Sainter* v. *Ferguson*, 7 Man. Grang. & Scott, 716, 62 Eng. Com. Law R. 716, where the defendant agreed not to practice as a surgeon, under a penalty of five hundred pounds, and the court held the amount liquidated damages, is the strongest case I have found in favor of the plaintiffs. But that case, in my opinion, bears no just analogy to the present in its facts and circumstances. And it is there considered, by Chief Justice WILD, a question of construction for the court, dependent upon the facts and circumstances which appear in, and surround the case. The point of the damages was very little considered. The current of the cases, early and late, where the subject has been much considered by the courts, undoubtedly is:—

1. That where there is any reasonable doubt upon the face of the instrument, how the parties intended it, it shall be construed as a penalty merely. *Davis* v. *Penton*, 6 B. & C. 216; 13 Eng. C. L, R. 147. Opinion of Chief Justice BEST, in *Crisdee* v. *Bol-*

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ton, 3 C. & P. 240, 14 C. L. R. 286. This was an agreement for the sale of a public house, and an agreement not to be engaged in the business of a publican, under the penalty of five hundred pounds, "the same to be recovered as, and for, liquidated damages." This was held at *Nisi Prius* to be liquidated damages, and the jury having been asked to pass upon the question of actual damages, and having assessed them at the same sum, the full bench refused to grant the rule to show cause why a new trial should not be had; the jury having assessed the actual damages at the same sum as the penalty. The case of *Shute* v. *Taylor*, 5 Met. R. 61, seems to have gone upon the general ground, that in doubtful cases the courts should construe the sum as a penalty.

2. It must be regarded as a settled general rule upon this subject, that where the sum is named as a penalty, in the contract, and no stipulation that it shall be regarded as liquidated damages, it can only be regarded as a penalty. Chitty on Con. 867, and note *n*. *Taylor* v. *Sandiford*, 7 Wheaton, R. 13; 5 Pet. Cond. R. 210.

The language of Chief Justice Marshall, in the last case applies with great force to the present one. "In general, a sum of "money in gross, to be paid for the non-performance of an agree-"ment, is considered as a penalty. It will not, of course, be con-"sidered as liquidated damages; it will be incumbent on the par-"ty who claims them as such, to show that they were so consid-"ered by the contracting parties." "Much stronger is the infer-"ence in favor of its being a penalty, when it is expressly reserved "as one." "The parties themselves denominate it a penalty; and "it would require very strong evidence to authorize the court to "say that their own words do not express their own intention." We could add nothing more as applicable to the present case, and the facts and circumstances require or justify nothing less.

Notwithstanding this case contains some of those features which have been sometimes seized hold of, for the purpose of justifying an opinion that the sum should be regarded as liquidated damages, viz., that it is a contract for the good will of a trade or business; that it is for the abstaining from doing an act, and one which one is in no likelihood of doing involuntarily or through inadvertence, and that the breach of the bond consists of a single act, or two at most; still it seems to us that it is little short of ab-

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surdity to say, that under the circumstances attending the giving of this bond, and the terms used, it could have been intended that this sum of ten thousand dollars, which in terms is denominated by the parties, a penal sum, is nevertheless no penal sum, but liquidated damages, and was so intended by the parties. The case of *Boys* v. *Ancell*, 5 Bing. N. C. 390, and *Kemble* v. *Farren*, 6 Bingham 141, strongly favor this view. In the latter case, the contract of the parties was explicit that the sum should be "liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof." And still the court held it a penalty and nothing else. We conclude, then, that this sum of ten thousand dollars, named in the bond as the "penal sum," must be so regarded by this court. The language of the court in the last case, shows how much the courts incline to regard all doubtful cases of this class, as penalties, and especially so, when the contract so declares.

This determination must be regarded, we think, as disposing of the ground upon which the plaintiff placed chief reliance at the time of bringing the bill.

But it is insisted that if the principals are entitled to a sum in damages, which is unliquidated, a court of equity will, under peculiar circumstances, entertain a bill for an offset, and liquidate the matter, or allow the party to proceed at law, and obtain a liquidation, and then decree an offset. This has, no doubt, been done under circumstances of peculiar equity. That was expressly decided by this court, *Nims* v. *Rood*, 11 Vt. Rep. 96, and also in *Foot* v. *Ketchum*, 15 Ib. 258. The usual course in such cases is to refer the party to a court of law, as was done in the cases last cited. Anything short of this would be regarded as offering a temptation to suitors, under circumstances, to withdraw matters from the common law courts, in order to have them litigated in the court of chancery, to the prejudice of the legitimate suitors in that court, and the burden and embarrassment of that court with matters not appropriately belonging to them. And it might sometimes be regarded as giving the orator an unequal option, in selecting the forum for trial. These considerations, and the farther one, that if there is any claim for damages growing out of the breach of this bond, it is a matter resting altogether *in pais*, depending upon a multiplicity of evidence, and that very conflicting,

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and so entirely appropriate for the consideration of a jury who can have the witnesses before them. All this would induce us, if there is any claim of this kind upon which, if the principals should prevail, there would be an equity in the orators, or any of them, in claiming to have a set-off against these notes, to refer the liquidator of the matter, to the tribunal having the common law jurisdiction of the claim.

We must inquire, then, whether if such a claim should be established at law, there is any sufficient ground made out for the interference of a court of equity, to decree a set-off. The consideration that the nominal parties to the contracts are not strictly mutual, is not now regarded as any valid objection to decreeing a set-off in equity, if the real parties upon whom the burden is ultimately to fall, are the same. The subject is sufficiently discussed in *Downer* v. *Dana*, 17 Vt. R. 518, and in *Blake* v. *Langdon*, 19 Ib. 485. I should not now desire to add to what is there said. These cases show that if the plaintiff here made out a case of the utter insolvency of one or more of the principals in these notes, the sureties would have an equity to compel the application of any sums due the principals from Wainwright's estate, before they were compelled to make any payment out of their own funds. So too, if the principals were solvent, and Wainwright's estate insolvent, they might compel the application of any sum due them from Wainwright's estate, notwithstanding the notes were signed by the other parties, as mere sureties.

But it seems to us that the decease of Wainwright, and the mere representation of insolvency, when the estate is in fact confessedly abundantly solvent, is no sufficient reason, in itself alone, why a court of equity should interfere to decree a set-off. It is, in fact, oftentimes a serious inconvenience, and sometimes, no doubt, attended with serious loss, for a party to be compelled to advance a large sum of money, when a portion or the whole of it is ultimately to come to him from the very same party now seeking to enforce him to pay money, which, in moral justice and equity, he is not justified in doing. But in legal equity such inconvenience is not regarded, or attempted to be redressed. It is presumed that where there is an ultimate solvency, the time of payment, if protracted by the mere delay of judicial administration, is not essential. There is in many respects, an analogy between

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this case and that of bankruptcy, but there are many important differences. And one is, that what is supposed to be the extreme exception in the one case, *i. e.* that the funds or assets will pay all the debts, is of frequent, if not the more general occurrence in the other case. So that what is in one case the exception, may be regarded as the rule in the other. And this, of itself, forms the sufficient reason why what is regarded as sufficient ground of equitable interference in the one case, should find no ground whatever to stand upon in the other.

And the other ground, to wit, the insolvency of the principals, it was said in argument, and is true, perhaps, is not in the case. But it was offered to be put in by way of supplemental bill. And the chancellor refused to allow the party to file any bill in the nature of a supplemental bill, with a view to remedy this defect, upon the ground that such facts were immaterial to the plaintiff's case. We now consider them the only ground upon which this case can be made to stand at all. If there were no other insuperable objection or obstacle in the plaintiff's progress, (which we shall soon consider,) the court of chancery, no doubt, should have allowed him to file his supplemental bill, or one in the nature of a supplemental bill, as was done in the case of *Gillett* v. *Hall*, 13 Conn. R. 426, which in this respect was similar to the case before the court. In that case the supplemental bill was filed during the pendency of the original bill, and before the hearing. And the additional facts thus brought into the case were regarded as essential to the jurisdiction of the court of Chancery.

If a case of the insolvency, in whole or in part, of the principal in the notes, or the party ultimately liable in equity, to pay them, was made out; and if also it were shown that this principal, either in his own name or the name of others, had a claim against the creditor, which was not, at law, under the control of the other parties to the notes; and especially in the case of the death of this principal, and a consequent liability to have this equitable offset absorbed in his estate, and distributed among his general creditors, we should consider that there had arisen a complication of equities, and counter equities, to the adjustment of which, the equitable powers of the court of probate were wholly inadequate. And so, within the rule laid down in *Adams* v. *Adams*, 22 Vt. R. 50, the court of chancery would have jurisdiction in aid of the probate court.

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And in a case like the one supposed, there is obviously no adequate remedy at law, as we have before intimated.

Some other objections are made to the plaintiff's claim, in a legal point of view, which we must briefly notice, to prevent misapprehension.

We do not suppose that the refusal of the chancellor to allow the party to file a supplemental bill, or one of that kind, before the original bill comes to a hearing, is either a final decree from which, in the first instance, an appeal lies, or that it is a decision which is strictly revisable in this court, being matter of discretion, But that refusal having proceeded, upon special grounds, we should, of course, give the party an opportunity to renew his application, after correcting this misapprehension of the chancellor, if this were the only difficulty in the plaintiff's case. If by this amendment the plaintiff makes a new case, and thus ultimately obtains a decree upon other grounds of equity than any stated in his bill, this would no doubt, form an important consideration, in fixing the terms of the amendment, or in the final adjustment of the costs, which would scarcely escape the notice of the court of chancery.

Whether the general frame of this bill is of a character to enable the party to obtain relief upon this latter ground, is certainly not free from doubt. It certainly is not the usual form of a bill to reach such an object. The usual course is, no doubt, for the sureties to bring the bill in their own names, as orators, joining the creditor and the insolvent principals, as defendants, which would present the parties in their more natural and true position before the court.

The only remaining objection urged by the defendants, which seems to us to afford serious obstacles to the recovery, is the change in the interest of those who bought out the concern of Wainwright, and to whom the bond was executed.

It was said, by the closing counsel for the plaintiff, that this was regarded by them, as one invincible obstacle to their recovery at law; and might therefore be regarded as a proper ground of application to a court of equity, for relief in the premises. There may possibly be a good deal of soundness in this proposition. As a general rule, I apprehend, where it becomes necessary to apply to a court of equity to reform a contract, and the equity court do

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so reform the contract, they also retain the case and decree relief. But this is by no means a uniform rule. If the matter is peculiarly appropriate for the consideration of a jury, as in the present case, the party is handed over to the common law courts for his redress, after having his contract set right, or the question of fact is sent to the courts of law to be tried by the jury.

But the objection to the jurisdiction being made to rest upon this ground here is, that the case is not one which a court of equity would be likely to retain upon this ground alone, it being so peculiarly fit for the consideration of a jury; and further, this ground of relief is not alluded to in the most remote sense, either in the original bill, or the proposed supplement. And we might no doubt, with perfect propriety, here dismiss this question. But as this is a question which the plaintiff must encounter upon the very threshold, if he elects to proceed with his case, we have deemed it important that it should now be disposed of.

The bond is in terms a joint obligation to Smith, Eastman and Foster, and not to their assigns, successors, or to administrators or executors even. The bond then being executed to the three jointly, and their interest at the time, being confessedly joint, the action must undoubtedly be in the joint names of the three, so long as all live. But it is claimed by the defendants' counsel, that a recovery could only be had for a breach during the time of the business being carried on by them jointly, *i. e.* between the 9th day of June and the 27th day of September, 1841. And from the examination which we have been able to make, it seems to us that in strictness of law, such only is the extent of Wainwright's obligation, *i. e.* to pay what damages should accrue to the three jointly, from his manufacturing or vending the prescribed articles, within the prohibited district. Nothing else is to be gathered from the terms of the bond, and nothing else probably was within the express contemplation of the parties at the time. *Myers* v. *Edge*, 7 T. R. 250, is a clear case to show that contracts of indemnity or bills of credit, addressed to a partnership, cannot be enforced after one of the partners have withdrawn from the concern, or not for credits given after such withdrawal. The principle of this case is of daily application and enforcement in every commercial state, where the common law of England prevails. In the case of *Dance et al.* v. *Girdler et al.*, 4 B. & P. 34, a bond was given to A., B.

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and C., and others, payable to their successors, for the faithful services of their collector. This society was afterwards incorporated, and the collector made default after such incorporation, and the obligors were held not liable. In *Barker* v. *Parker*, 1 T. R. 287, a bond to the obligee and his executors, for the faithfulness of a clerk, was held not to make the obligor liable for money received by the clerk and not accounted for, while the business was carried on by the executor. *Strange et al.* v. *Lee*, 3 East. 484, is a strong case in favor of restricting the obligation to the time of the continuance of the joint interest of the obligees. But it is not to be understood, that these cases go so far, as to hold that a bond executed to one, and his successors and partners, is not to be regarded as binding to the full extent of the terms used, and the intention of the parties. That is expressly declared by Lord Mansfield, in *Barclay* v. *Lucas*, 1 T. R. 291, in note, and again reported by Ellenborough, C. J., in *Strange* v. *Lee*. The contrary would certainly involve a very glaring absurdity. But a court of law would of course confine the parties to the contract, and not enlarge its obligation, by construction or implication. And a court of equity must do the same, unless applied to to reform the bond, and it would not reform a contract of this character, except upon the most satisfactory grounds.

But the present case seems to us to rest upon somewhat peculiar grounds, in regard to the propriety of affording relief in favor of those who should carry on the business, although not the same persons named in the bond.

1. It is of a negative character, not to do, or that any other shall do, a particular thing; but a personal undertaking to refrain from doing it. So that this cannot in any sense be said to be an undertaking founded upon the personal confidence of the particular partners to whom it was executed. If he refrained from the business, it would be indifferent to him to whom the business was left, except so far as his regard for the public good was concerned, and this is not, ordinarily, much of an ingredient in the consideration of contracts.

2. There can be no reasonable doubt both parties expected this bond to enure for the benefit of the business sold out, so long at least, as it should be continued by the same persons, either jointly or severally, or associated with others. This is sufficiently evi-

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denced by the conduct of both. The obligor repeatedly assenting, and showing by his conduct very obviously his belief, that he was liable upon his bond, as well after as before the change in the partners. And the obligees changing their firm from time to time, without reserve, and still very obviously relying upon the perfect validity of the bond, as a contract binding upon Wainwright.

3. The good will of Wainwright's business was no doubt an important consideration with the obligees, for which they considered that they paid a very considerable sum, and they would not be likely to do an act readily, by which it would become forfeited. Wainwright, too, esteemed this important to himself, and that he was receiving very considerable for it, and after he resumed the business again, as he did in other parts of the State, he was no doubt exceedingly anxious to recover the lost field of trade, which we have no reason to doubt he would immediately have done, had he supposed the obligation of the bond had ceased, by reason of the change in the partners, of which he was fully aware.

Under these circumstances it seems to us, that it would be a virtual fraud upon the obligees to allow Wainwright to escape from the obligation of the bond. Upon this ground alone, if they made proper application to the Court of Chancery to have the bond reformed in this particular, we entertain no doubt it would be the duty of that court to make such a decree upon the present state of the evidence.

1. The result of all which, is that the plaintiff's case if he elect to proceed with it, must rest mainly, for its choice to be retained in the Court of Chancery, upon the equitable rights of the sureties, growing out of the decease and insolvency of the principals.

2. To bring this into the case, it is requisite to have the case remanded to the Court of Chancery, and there obtain leave, in the discretion of the chancellor, to file a bill in the nature of a supplemental bill.

3. In this supplemental bill it will be necessary also to include an application to the Court of Chancery to reform the bond so as to extend it to the obligees and their associates until the decease of Smith, or more properly, until the decease of Wainwright.

4. The party must then obtain his verdict in the suit at law, the rule there entered for nonsuit having been already vacated by the chancellor.

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The decree of the chancellor is reversed, and the case remanded to the Court of Chancery, to be there disposed of, in accordance with the rules here decided, and others, which may become applicable to the same, in its progress and final determination, in conformity to the principles of equity law.

OLIVER C. WAIT *v.* SOLOMON JOHNSON.

Book Account. Principal and agent. Disallowance of account. Auditors. Report.

Where the plaintiff owned the business, and hired another to carry it on, and the defendant had business done, it is of no importance whether the defendant knew that the plaintiff owned the business, unless he has suffered loss by being misled in that particular.

Where the auditor simply states, that the account of the defendant is disallowed, without the facts or grounds upon which the disallowance proceeded, and it not appearing that the auditor was requested to state the facts found by him, in regard to the defendant's account,—*held*, that one of these things is indispensable, to show sufficient ground to set aside the report.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the following facts:

That in the fall of 1844 or 1845, one James Shaw, a blacksmith by trade, built a blacksmith shop, on land owned by one Best, said Best having consented that said Shaw might do so. The said Shaw carried on business in said shop on his own account, as a blacksmith, for two years, and then rented said shop to one Fillemore, and hired himself to said Fillemore by the month. Fillemore carried on the shop about two years, and during said time, Shaw was the principal workman in said shop, but the work was done in the name, and on the sole account of said Fillemore. On the 12th of February, 1849, said Fillemore, left said shop, and surrendered the possession to Shaw, and said Shaw, from that time to the 18th day of July, 1849, carried on business in said shop on his own account, and in his own name, and during this time defendant

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Johnson had work done at said shop, and there was an open account between said Shaw and Johnson, which was unsettled at the time of the audit. On the 18th day of July, 1849, the said Shaw rented said shop and the tools, and hired himself to the plaintiff, to work in said shop. The plaintiff took possession of the shop, and stocked the same with iron and coal, and carried on the blacksmith business, in his own name, until the 1st day of February, 1850, and during said time, employed the said Shaw, and paid him for his services by the day. While the plaintiff was thus carrying on business in said shop, and paying said Shaw, the account accrued against the defendant. The defendant supposed that said Shaw was doing business on his own account, and not on the account of the plaintiff. The plaintiff did not, at any time during the accruing of said account, give notice to the defendant, that said Shaw was at work in said shop for the plaintiff, nor did the defendant make inquiry of any person, on whose account said Shaw was at work in said shop. The contract between Shaw and the plaintiff was a verbal contract.

Judgment for the plaintiff on the report, and general exceptions by the defendant.

—— —— for defendant.

When a person deals with an agent, having no knowledge that he is such, he can apply any claim in his favor against the agent, in payment of a claim in favor of the principal, in a suit in the name of the principal, for articles delivered, and labor bestowed by the agent. *George* v. *Claggett*, 7 T. R. 355. *Kelley* v. *Munson*, 7 Mass. R. 324.

L. E. Pelton for plaintiff.

The general owner of property sold, or the person interested in labor performed, can always support his action therefor. *Lapham* v. *Green*, 9 Vt. 407.

And that the defendant did not know with whom he dealt, can make no difference, so long as no fraud was practiced upon him.

By the Court. From the facts reported, there seems to be no doubt whatever, that the plaintiff is entitled to recover the amount of his account, allowed by the auditor, upon the facts re-

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ported by him. The plaintiff owned the business and hired shop, and the defendant had the business done. It is of no importance whether the defendant knew that plaintiff owned the business, unless he has suffered loss by being misled in that particular, nothing of which appears. The only question, it seems to us, which could possibly arise in the case, is how far the defendant's account should have been allowed in offset. But in regard to this the report is wholly silent. It is simply stated, that the account was disallowed. The facts or grounds upon which the disallowances proceeded, are not stated, nor is it stated, that the auditor was requested to state the facts found by him, in regard to the defendant's account. One of these things is indispensable, to show sufficient ground to set aside the report.

Judgment affirmed.

Lewis H. Beals *v.* Legrand Olmstead.

Vendor and Vendee. Warranty. Questions for jury. Implied warranty. Declaration.

When the vendor's statements form the sole basis of the sale, his declarations are ordinarily to be regarded as a warranty.

So also, where the article is bought for a particular use, and the vendor knew that the vendee would not buy an inferior article, the sale of the article for the particular use, ordinarily implies a warranty that it is fit for the use.

And unless it is apparent that vendor's statements, in regard to the quality of the article, were understood by the parties, at the time, as amounting to nothing more, than recommendations of the goods, and were matters of opinion merely, and the vendee was still left to understand, that he must examine and judge for himself, the case should be submitted to a jury, unless there is a fatal variance.

If a declaration is defective, that question should be made upon demurrer or in arrest of judgment.

Assumpsit on the warranty of a quantity of hay; the declaration was as follows:

"In a plea of the case, for that the defendant in consideration

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"that the plaintiff would pay defendant fifty-five dollars for a cer-
"tain mow of hay, to wit, on the 31st day of January, 1850, the
"defendant undertook and promised plaintiff, that said hay was
"cut and cured in good season, was good bright hay, and plaintiff
"then and there paid said defendant fifty-five dollars, and avers
"that said hay was not cut and cured in good season, but was
"wholly worthless."

There was also a count for money had and received.

Plea, general issue, and trial by jury.

On the trial, plaintiff gave evidence, that being in want of hay, the defendant offered to sell the plaintiff a mow of hay. That the plaintiff called to see said hay, and went with the defendant to the barn where said hay was, and the defendant offered to let the plaintiff pull off a board from the barn to examine said hay, to which the plaintiff replied, that he could not tell by that, but that he, the defendant, knew what use he, the plaintiff, wished to make of the hay, namely, to keep his oxen during spring and summer while at work on the Rail Road, and that the defendant knew whether his hay was such as would answer or not. Thereupon the defendant told the plaintiff, that the hay was good hay, cut in good season, and was well cured, and put into the barn in good order. The trade was not then concluded, but negotiation was going on for several days when the trade was completed; but it did not appear, that any thing further was said between the parties, as to the quality of the hay. When the plaintiff came to get the hay, and remove the covering, the hay was found to be worthless, and the plaintiff refused to take the same. An altercation ensued between the defendant and plaintiff, when the plaintiff said, "Did you not tell me that the hay was good hay, cut early, and cut around the barn, and got in in good order?" to which the defendant replied, "I did, and say so now." It further appeared that said hay was full of brakes, and not such hay as grew around the barn.

Whereupon the court directed a verdict for defendant, to which the plaintiff excepted.

Stevens & Edson for plaintiff.

In this cause the plaintiff contends that the court erred in ordering a verdict for the defendant.

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There was sufficient evidence of the defendant's representations, as to the quality of the hay, to have the fact submitted to the jury, whether these representations were by the vendor, meant as a warranty of the quality of the article sold, and was so understood by the vendee. *Beeman* v. *Buck*, 3 Vt. 53. *Foster* v. *Estate of Caldwell*, 18 Vt. 176. *Whitney* v. *Sutton*, 10 Wend. 411. Smith's L. C. Vol. 1, 178.

If the defendant assured plaintiff that the hay was good, and the plaintiff relying on that statement, bought the hay, defendant is bound to make his representations good. *Wilmot* v. *Wead*, 11 Wend. 584. *Haquis* v. *Plympton*, 11 Pick. 99–100.

The word *good*, as applied to hay is not an unmeaning word; it must at least mean that the article was merchantable; but the bill of exceptions finds that the hay was entirely worthless.

H. R. Beardsley for defendant.

The declaration alledges the contract of warranty to have been as follows, "That the hay was cut and cured in good season and was good bright hay," and the only breach alledged is, "that the hay was not cut and cured in good season." This being the only breach alledged, the question is, does the testimony reported in the case establish this breach. All it amounted to, or tended to prove, was the fact, that when the covering of the hay was removed the hay was found to be worthless.

Now, does this fact tend to prove the breaches laid in the declaration, in the particular there alledged,—clearly not; because, for ought this fact shows, the defendants' declaration "that the hay was cut and cured in good season," was strictly true, and the fact that the hay was worthless, does not tend to negate the truth of the statement.

The testimony did not go far enough; it should have shown in what particular the hay was worthless, or in other words, it should have shown that it was worthless, by reason of not having been cut and cured in good season.

Indeed, we insist that the case is entirely naked of anything, tending to show, "that the hay was not cut and cured in good season." But on the contrary, the testimony reported has the very opposite tendency, namely, to prove "that its worthlessness consisted in its being full of brakes, and in being an inferior kind

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of hay, taken not around the barn but in another part of the meadow, being wild grass, and hence, worthless for the use that the plaintiff wanted it.

By the Court, In regard to the general merits of this case, the principles which must govern, are too well settled to require much discussion.

As to whether the defendant's assertions in regard to the quality of the hay were understood to form the basis of the contract, there could be but one opinion. The plaintiff declined to examine the hay, saying he could tell nothing about it. He expressly informed the defendant he wanted it for a particular use, to feed his oxen in spring and summer, while at work upon the Rail Road, and that he must have such hay as would answer that use. The defendant then proceeded to make a statement, in regard to the hay, which brought the quality of the hay within the desideratum. And after the negotiation had continued some days, nothing more being said between the parties, in regard to the quality of the hay, the trade was closed, and plaintiff paid for the hay, as the declaration states, and no question is made upon this point. It is scarcely possible to suppose a case, where it is more absolutely certain, that the defendant's statements formed the sole basis of the sale, than the present, and in such case the declaration is ordinarily to be regarded as a warranty.

As to how far statements made by the vendor, are to be regarded as an express warranty, every case must depend very much upon its own circumstances. And unless it is apparent, that defendant's statements, in regard to the quality of the hay, were understood by the parties, at the time, as amounting to nothing more than recommendations of the goods, and were matters of opinion merely, and the plaintiff was still left to understand, that he must examine and judge for himself, the case should be submitted to a jury, unless there is a fatal variance.

There is very much in the pressnt case to show, that defendant's statements ought to be regarded as a warranty.

1. They were understood by both parties, as forming the basis of the contract of sale, there being no good opportunity to examine the goods, and none in fact attempted. 2. They were in regard to matters upon which the defendant was supposed, and professed,

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to have personal knowledge, and what he said, he asserted positively; therefore he ought to expect to be bound by it. 3. The hay was bought for a particular use, and the defendant knew plaintiff would not buy an inferior article. The sale of the hay then for this particular use, ordinarily implies a certainty that it is fit for the use.

The mere assertion that hay is good hay, certainly implies something more than was found in this case, but good hay for the particular use, cut and cured well, in good season, is sufficiently definite one would think.

We think the breach alledged is sufficiently broad. It is even broader than the promise alledged. But the plaintiff must of course be confined to the breach of the contract alledged. And that seems to us to afford a very considerable range, under the proof stated.

Judgment reversed and case remanded.

If the declaration is defective, that question should be made upon demurrer, or in arrest of judgment.

HIRAM H. LITTLE *v.* STEPHEN E. KEYES & C. W. KEYES, TRUSTEE.

Husband and Wife. Evidence.

Where the *right* or *cause of action* accrues during coverture, the husband may sue alone. So if the right of action is inchoate before marriage and consummate after, the husband may sue alone, or join the wife; but in no case must the wife be joined, except where the cause of action would survive to her.

The plaintiff offered, as proof of an acknowledgment of the defendant, (a letter dated March, 1845, written by the defendant to the plaintiff's wife, after her marriage, she having signed a note with the defendant before her marriage,) that the plaintiff's wife signed the note as his surety, that he was under obligation to pay the note. It was held — that the evidence should pass to the jury, under instructions from the court, as to the law arising from the facts, as they shall find them to exist from the evidence.

INDEBITATUS ASSUMPSIT for money paid, laid out and expended. Plea, *non-assumpsit,* and trial by jury.

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On trial, the plaintiff offered in evidence, a note dated May 1, 1838, signed by the defendant, and one Hetty M. Keyes, for the sum of two hundred and ninety-six dollars, payable to Elizabeth G. and Sarah B. Little, on demand with interest. The plaintiff further showed, in evidence, that the said note was given by the defendant, for a tract of land in Sheldon, sold to the defendant by said Hetty M. Keyes, as agent for said Elizabeth G. and Sarah B. Little. That said Hetty M., afterwards, in 1840, removed to the State of Ohio, and soon after her removal, she delivered said note to said Elizabeth G. and Sarah B. Little, who then resided in that State. That prior to the delivery of said note, by said Hetty M. to said Elizabeth G. and Sarah B. Little, it was signed by Stephen E. Keyes, (the defendant) alone, and that at the time of such delivery, an objection was made to the ability of the defendant, and thereupon said Hetty M. Keyes signed said note as surety for defendant. It did not appear that the defendant had at any time, requested said Hetty M. Keyes to sign or become security for the payment of said note. The plaintiff further proved, that said Hetty M. Keyes afterwards intermarried with the plaintiff, and was still his wife. The plaintiff further offered and read in evidence, a letter from the defendant, dated March, 1845, to plaintiff's wife, after her intermarriage with the plaintiff, for the purpose of showing that the defendant recognized the act of said Hetty's signing said note, and assented to the same, and recognized a liability on his part to indemnify said Hetty for so doing. He also read the depositions of James Little, Lyman Little and William T. Bascomb, for the purpose of showing that said note was given for said land, and that said Hetty M. signed said note, that he, the plaintiff had paid all of said note, except one hundred dollars paid by defendant, in consequence of the liability thus assumed by his wife, before her intermarriage with him. Upon this evidence, the defendant insisted that the plaintiff's wife should have been joined in the action, and for want of such joinder of the plaintiff's wife, the action could not be sustained. The objection was overruled by the court. The defendant then insisted, that the said letter did not contain either a request to the plaintiff's wife to pay said note, nor an acknowledgment that said note had been signed by said Hetty by his request, nor the defendant's assent to such an act. But the court directed the jury, that if they should find from

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the letter aforesaid, that the defendant did assent to said Hetty's signing said note, and did recognize a liability on his part to indemnify said Hetty, they would return a verdict for plaintiff. Verdict for plaintiff.

To the decision of the court and charge aforesaid, the defendant excepted.

C. Beckwith for defendant.

1. The plaintiff seeks to recover by virtue of a contract made by the defendant with the plaintiff's wife, before marriage. The defendant's obligation by that contract was, that he should indemnify and save harmless, the plaintiff's wife, from all damage, in consequence of her signing a promissory note with him. When that contract was broken, the plaintiff and his wife might have declared upon it specially, and to recover any costs or expenses they must have declared specially. General assumpsit for money paid will not change the parties to the suit. As the wife should have been joined, had the declaration been special, she should have been joined in this suit. 1 *Chitty's Plead.* 29. *Morse* v. *Earl et al.*, 13 Wend. R. 271.

2. The court erred in permitting the defendant's letter to go to the jury for them to find from a recognition of his liability to plaintiff's wife. The legal effect of evidence is a question for the court and not for the jury. *Morrill* v. *Frith*, 3 M. & W. 402. *Nelson* v. *Harford*, 8 M. & W. 823. *Doe d'Curson* v. *Edmonds* 6 M. & W. 295. *Clarke* v. *Dutchess*, 9 Cowen, 674.

L. E. Pelton and *H. E. Hubbell* for plaintiff.

The objection, that it was necessary to join plaintiff's wife, appears to be without foundation. If she had been joined the suit would have failed for the misjoinder. She had no interest in the case, the money paid for defendant was never hers.

The letter was properly submitted to the jury for them to find facts under the instructions of the court, the exceptions are not to the instructions of the court to the jury, but that the court did not construe the letter.

The opinion of the court was delivered by

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ISHAM, J. The plaintiff, in this action, seeks to recover the amount of money paid by him, on a note payable to Elizabeth and Sarah Little, and which was executed by the defendant as principal, and the wife of the plaintiff, before her marriage, as surety. We learn from the case, that *after* the marriage of theplai ntiff, he paid the money on the note for which this suit is brought.

It is objected in the case, that this action should have been brought in the name of the plaintiff and his wife, and that the action cannot be sustained in the name of the husband alone.

It is evident, that no right of action on this matter existed at the time of the marriage, for no money had been paid by the surety at that time. There was simply a liability on her part, and which liability was afterwards imposed on the plaintiff by his marriage. A right of action accrued only on the payment of the money in discharge of that liability. If the money had been paid by her before marriage, the cause of action would have accrued whilst sole, and she must then have joined in the action, as in case of his death, the right of action would have survived to her. And possibly she might have been joined, if after marriage, the claim had been paid from her separate estate. But where the *right* or *cause of action* accrues during coverture, as in this case, on the payment of the money in discharge of the debt, the husband *may* sue alone, so if the right of action is inchoate before marriage and consummate after, he may sue alone or join the wife. In no case *must* she be joined, except where the cause of action would survive to her. And as the money in this case was advanced by the husband in his own right, and in discharge of a personal obligation resting upon him, we do not see that the cause of action would survive to her, on the death of the husband. It is manifest his personal release would have discharged this debt, on the ground that the legal interest in the contract was vested in him, and having this legal interest, he can sustain this suit alone. Chitty on Plea. 29. 1 B. & Ald. 224, *McNeilage* v. *Holloway*.

The note upon which this payment was made, was dated May 1, 1838, and at the time of its execution, was signed by the defendant alone. The note, during the year 1840, was taken to Ohio, and delivered to the payees and owners, by the wife of the plaintiff, and before her marriage. Objections being made as to the ability of the maker to pay the note, it was signed, on that oc-

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casion by the plaintiff's wife, before her marriage, as surety for the defendant.

It is claimed on the part of the defendant, that this action cannot be sustained for the money paid by the plaintiff on this note, as it was not signed by the surety at the time of its execution, or by the request of the defendant, and that it was a voluntary act on the part of the surety, and for which no obligation of indemnity arises on the part of the defendant.

It was unquestionably necessary for the plaintiff to show by competent evidence, that the obligation assumed by the plaintiff's wife before her marriage, and the payment of the money by the plaintiff after the marriage, were made at the request of the defendant, or under such circumstances as would show that the relation of principal and surety existed between them. This as a question of fact, could be proved by various modes. It was competent to show an express request, either previous or cotemporaneous with the execution of the note, or circumstances from which the law will imply a request. It was competent also to show that fact by the subsequent conduct of the parties, or by the acknowledgment of the defendant, either verbal or by written communication.

For this purpose, the letter dated in March, 1845, written by the defendant to the plaintiff's wife, after her marriage, was offered and read in evidence. It is to be observed, that this letter was not offered to prove a special contract, on which the action was brought, and on which the court were called upon to decide as to its legal effect, but it was offered as proof of an acknowledgment of the defendant, that the plaintiff's wife signed the note as his surety, that he was under obligations to pay the note, and relieve the plaintiff and his wife, from the payment of the same. For that purpose, the letter was properly passed and submitted to the consideration of the jury, as depositions used in the case are submitted, for them to ascertain and draw the inference, whether or not, at the time of signing the note, or paying the same, the relation of principal and surety existed between them.

The evidence should pass to the jury under instructions from the court as to the law arising from the facts, as they shall find them to exist, from the evidence. This instruction was given, and no exceptions have been taken to the charge of the court. And

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the jury have found from this acknowledgment of the defendant as contained in this letter, that the defendant did assent to the signing of this note by the surety, and did recognize a liability on his part to indemnify the surety therefrom. And this finding of the jury, we are convinced, is founded in the justice and equity of the case, and that the facts so found, do create a liability on the defendant to repay the money advanced on the note.

The result is, that the judgment of the county court must be affirmed.

James H. Farrar, by his Guardian, H. D. Farrar v. E. H. Olmstead and Wife.

Abatement. Guardian. Decrees of the Probate Court.

When a minor has no parent living who is authorized to act as his guardian, on application of such minor or of any relative or friend, the probate court may appoint some suitable person, and under this provision of the statute, whenever the appointment of a guardian is made by the probate court, notice is not required to be given to any one.

James H. Farrar commenced an action in general assumpsit by his guardian, H. D. Farrar, and the defendants plead in abatement, that H. D. Farrar was not a legal guardian of the minor, and had no right to commence the action. The question arising upon demurrer, as to the legality of the appointment of the guardian, it was *held*, that so long as the decree of the probate court making the appointment remained unappealed from, or unreversed, this court is bound by the adjudication of the probate court, and that third persons cannot plead the matter in abatement of suits commenced, and in this collateral manner nullify the decrees of the probate court.

Assumpsit. The action was commenced by James H. Farrar, in the name of H. D. Farrar, his guardian. The defendants plead in abatement that H. D. Farrar is not legal guardian of the plaintiff, that said James H. has a maternal parent still living and residing in the same probate district with said James H., &c. The plaintiffs replied, that the maternal parent of the said James H., was and still is a married woman, and not authorized to act as the guardian of the said James H. To the replication of the plaintiffs the defendants demurred.

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The county court, *pro forma*, decided that the plaintiffs writ and declaration be quashed. Exceptions by plaintiff.

A. O. Aldis for plaintiff.

1. The plea in abatement holds the appointment of H. D. Farrar as guardian to be void, because the minor at the time of such appointment being the owner of personal estate and having a mother living, the mother had no notice of the application for such appointment and no opportunity to make her objections. This position the defendants would sustain by a construction of the third clause in Sec. 4, Chap. 65 of the Revised Statutes, p. 332. The replication avers, that the mother at the time of such application and appointment was and still is a married woman and "was not authorized to act as guardian" of such minor, and therefore not entitled to notice.

The words of the statute in clause 3d, Sec. 4, Chap. 65, are: "When a minor having a parent living, *who is authorized to act as his guardian*," *&c., then* "previous to such appointment, the parent shall have notice of the application," &c.

It is only in this particular case that the parent is entitled to notice. The statute does not provide for notice in any other case.

2. The marriage of the mother had extinguished her authority as guardian. Sec. 2 and 20 of Chap. 65 of Rev. Stat., 1839. *Field et ux.* v. *Torrey*, 7 Vt. 372.

The replication avers that she was married and was not authorized to act as guardian.

3. The appointment of H. D. Farrar as guardian by the probate court, *though without* notice if required, is not void. He can act under it until his authority is revoked by the probate court. The irregularity cannot be takan advantage of by a plea in abatement.

Admit for the sake of argument, that notice to the parent was one of the requisite "regulations" mentioned in the first paragraph of Sec. 4th. The remedy for its omission is by application of the mother to the probate court to revoke the appointment and allow her a hearing. *Cleveland* v. *Hopkins*, 2 Aik. 394.

H. M. Safford and *H. R. Beardsley* for defendants.

The decision of the county court in this case was correct.

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The court of probate is a court of special and limited jurisdiction and derives all its authority from the statute. *Hendrick et ux.* v. *Cleveland*, 2 Vt. 329.

The minor was the owner of personal estate at the time of the application to, and appointment by the probate court of Harvey D. Farrar his guardian, and the mother of said minor was at the same time living within the State, and as a prerequisite to said appointment, due and reasonable notice should have been given to the parent of said minor of the application and an opportunity to make her objections. Chap. 69 Sec. 3 Compiled Statutes.

If the probate court appoint a guardian over a minor who owns estate, real or personal, and has a parent living within the State without such notice, such appointment is void. *Shumway et al.* v. *Shumway*, 2 Vt. 339.

The same doctrine is held in the case of *Chase* v. *Hathaway*, 14 Mass. 222.

The opinion of the court was delivered by

ISHAM, J. To this action in general assumpsit, the defendants have plead in abatement that Harvey D. Farrar was not a legal guardian of the minor James H. Farrar, and had no right to commence this action.

The question arising upon this demurrer. is upon the legality of the appointment of this guardian by the probate court, and whether notice of such application was necessary to be given *to the mother or parent* of the minor previous to the appointment of such guardian. The demurrer admits that no such notice was given.

The 2d Sec. of Chap. 69 of Comp. Statutes of 1850, page 406, provides that if the father of a minor child be dead, the mother remaining unmarried shall be the guardian of such child, for all purposes, until another shall be appointed.

The 58th Section, provides that the marriage of a female, who is a guardian, shall *extinguish her right and authority as such*, in which case another guardian may be appointed. The marriage, the moment it is consummated, takes away her authority to further act as such guardian. The minor, then, has no parent living *who is authorized* to act as his guardian.

The 4th Section of this act provides that when a minor has no parent living who is *authorized* to act as his guardian, on applica-

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tion of such minor, or of any relative or friend, the probate court may appoint some suitable person to be his guardian. Under this provision of the statute, whenever the appointment of a guardian is made by the probate court, notice is not required to be given to any one—for the obvious reason that no adverse interest is involved in the adjudication, or concluded by the decree of the court. And we entertain no doubt but that the appointment of the guardian in this case falls within this provision of the statute, and that no notice was necessary to be given. The demurrer in this case admits the death of the minor's father, and the marriage of his mother, by which her right and authority to act as guardian is as effectually extinguished, as if the relation of parent and child did not exist. This right being taken away by statute, notice of the application for a guardian was not necessary, for the reason assigned. The mother had no adverse right involved in the adjudication, or which could be concluded by the decree of such court.

Under the 3d class of cases mentioned in the 4th Section of this act, notice is required to be given to the parent previous to such appointment. This case, we think, is unaffected by this provision of the statute. It is confined to cases *where the minor has a parent living who is authorized to act as his guardian.* In this case, if the mother of this minor had remained unmarried, she would be authorized by express provision of the statute to act as his guardian, and being authorized and having the right, she could not be deprived of the same by the appointment of another as guardian, without notice being given of such application, and her being found incompetent or unsuitable to discharge the duties and trust of that appointment. And wherever the action and decree of the probate court are necessary to deprive her of that right, notice must be given. But when she has extinguished that right and authority by her own act, in contracting a relation inconsistent with the duties of that appointment, the case then falls within the first class of cases mentioned in the 4th Section of the act, and no notice is necessary to be given previous to such appointment.

There is another difficulty in sustaining this plea in abatement. So long as the decree making that appointment remains unappealed from or unreversed, we must feel bound by the adjudication of that court.

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The power of appointing guardians exclusively belongs to the probate court; no other court has concurrent jurisdiction with it. They have power also to vacate such appointments for any matters arising subsequent to the decree, and if there has been any error in their proceedings in making such appointment, it is one of the inherent powers of the court to revise and correct its own proceedings. It was so held in *Adams* v. *Adams*, 21 Vt. Rep. 167. But this must be on direct application to that court for that purpose, and from their decree appeals can be had to the appellate court. And it is the only proper way by which the validity of such decrees can be called into question. If the parents, relatives and friends, are satisfied with the decree and appointment, and take no steps for its reversal, certainly third persons cannot plead the matter in abatement of suits commenced, and in this collateral manner nullify the decrees of the probate court.

The result is that the judgment of the county court must be reversed, and the defendants must answer over.

The State *v.* Julius D. Scott.

Manslaughter. Indictment.

One indicted for *manslaughter* may, on trial, be convicted for an *assault and battery*, though the indictment contain no count specially charging the minor offence.

This was an

Indictment for Manslaughter in several counts. Plea, not guilty, and trial by jury, in the county court, September Term, A. D. 1851,— Bennett, J., presiding.

On trial, the government introduced testimony, tending in all essential particulars, to prove the crime of manslaughter as charged in the indictment.

The respondent claimed that the evidence was insufficient to prove the beating and wounding, as alledged in the indictment, and f proved, that the evidence was not sufficient to show that the leath of Bailey, was the result of the beating and wounding by

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the respondent, and introduced some testimony, tending to prove that it might have resulted from another cause; and it was admitted that Bailey died on the 16th day of January, 1851, one month after the alledged beating.

The court charged the jury, that if they were fully satisfied from the evidence, that the assault and battery and beating and wounding, as alledged in the indictment, was proved, and were not so satisfied that the death of Bailey was the result of such beating and wounding, they might return the respondent guilty of a common assault and battery, and not guilty of manslaughter on the residue of the indictment.

The jury returned a verdict of guilty of an assault and battery, as charged in the indictment, and not guilty as to the residue of the indictment.

The respondent excepted to the charge of the court as above recited.

W. C. Wilson, Stevens & Edson for respondent.

We insist that an indictment for a crime which is felony at common law, and by statute, will not support a conviction for a misdemeanor. 1 Russell on Cr. 777 to 782. 2 Strange 1133. 1 Leach 12. 1 Chit. on Crm. Pl. 206, 207, 520, 521, 522.

The English statute is not applicable to this indictment; but if it were, the case does not come within its provisions, as construed by the judges of the court of criminal appeal in England. *Regina* v. *Bird et ux.*, 2 Eng. Law and Eq. R. 448.

Evidence which would be admissible to justify or mitigate an assault, might be inadmissible on trial for manslaughter, under this indictment. 2 Stark. Ev. 720. 1 Coxe 424. 2 Stark. Ev. 52. 6 Mod. Rep. 172.

The conviction in this case cannot be pleaded in bar to any subsequent proceeding for the same assault. *State of New Jersey* v. *Cooper*, 1 Green.'s Rep. 362. *Regina* v. *Bird et ux.*, 2 Eng. L. and Eq. Rep. 448.

G. F. Houghton for State.

1. A defendant indicted for assault and battery with intent to murder, may be convicted of a simple assault and battery. *Greater offences include the lesser of a kindred character.* Roscoe's Dig.

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Cr. Evidence, p. 74. 1 Starkie's Evidence (5th Am. Ed.) p. 418. *Hudson* v. *State*, 1 Blackford's R. 318. *Dunham* v. *State*, 1 do. p. 37. *Stewart* v. *State*, 5 Ohio R. 242. *State* v. *Coy*, 2 Aiken's R. 181. *Commonwealth* v. *Dunn*, 19 Pickering 479. *Commonwealth* v. *Hope*, 22 do. 17. *Commonwealth* v. *Griffin*, 21 do. 523.

2. As to the question of practice, it has been decided that the proper practice is to indict and try for the higher crime, and if the part of the offense which is peculiar to that is not proved, and all that is necessary to constitute the inferior one is, that the verdict should convict of the inferior felony and acquit as to the residue of the charge. 1 Green's New Jersey R., *State* v. *Cooper*, p. 362.

3. So far as precedent is concerned, the principle sought to be established was distinctly set forth as long ago as 1827, in the case, *the State* v. *Coy*, 2 Aiken 181.

The opinion of the court was delivered by

ISHAM, J. The respondent was indicted for manslaughter, and on trial was convicted, under the charge of the court, of a common assault and battery. The jury have found by their verdict, that *the death of Bailey* was not occasioned by the assault, beating and wounding, as alledged in the indictment, and the question is, can a conviction for an *assault and battery* be sustained on an indictment for *manslaughter*.

In England, the rule seems well settled, that "where an indict-"ment includes an offense of an inferior degree, the jury may dis-"charge the defendant, of the higher crime, and convict him of "the lesser." As on an indictment for murder, he may be convicted of manslaughter; for robbery, of theft; for grand larceny, of petit larceny, and on an indictment founded on a statute he may be convicted of an offense at common law. In all these cases, and others of a similar character, the inferior offense of which he is convicted, is of the same character as the greater of which he is indicted, only it is inferior in degrees of guilt. The evidence introduced to prove the greater offense, sustains the latter. The principle is favorable for the respondent, and for which he has no reason to complain.

It is equally well settled in England, that on an indictment for a *felony at common law*, a conviction cannot be had for a *misdemeanor*. The reasons assigned are, that the respondent loses the

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right of a special jury, benefit of counsel, and a copy of the indictment, and for this he has reason to object and complain, and courts adopting rules most favorable for the respondent, will not allow such conviction. But for these causes, we see no reasons why at common law, such a conviction would not be sustained. These reasons manifestly do not exist in this State.

Felony, as existing at common law, is not known under the laws of this State, as crimes do not work a forfeiture of the estate. But offences are distinguishable into what may be termed crimes and misdemeanors; the former punishable capitally, or by confinement in the State Prison, and the latter by fine, or imprisonment in the county jail. On the trial of these cases, there is no difference in the mode of trial or the right of the respondent, and no reason exists in this State, why one indicted for that which would be a felony at common law, may not be convicted of a misdemeanor. The conviction would bar a subsequent prosecution, as well as a conviction for theft, under an indictment for burglary or robbery; indeed, we must consider this subject as having been decided in this State in the two cases to which we have been referred. In case of *State* v. *McLean*, 1 Aik. Rep. 313, the respondent was indicted for forgery, which was punishable by imprisonment in the State Prison, but of which offence he was acquitted by the jury and convicted of a misdemeanor, a cheat, an offense at common law, and fined. So in the case of *State* v. *Coy*, 2 Aik. Rep. 181, the respondent was indicted for an *assault with intent to murder*, an offense punishable by imprisonment in the State Prison, and on trial he was acquitted of that offense, but convicted of a common assault. Manslaughter is punishable by imprisonment in the State Prison; it is followed by no greater punishment or legal consequences than *forgery* or an *assault with intent to murder*. And if a jury in those cases may acquit of the greater offense, and convict of the lesser, it would seem to follow, as a necessary conclusion, that the same principle would apply to the other case.

The result is, that the judgment of the county court must be affirmed.

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JOHN H. BURTON *v.* ORLANDO STEVENS.

Assumpsit. Statute of Limitations.

B. commenced his action upon two promissory notes dated March 2, 1832, executed by S. to B., to which S. plead the statute of limitations. B., to remove the statute bar, relied upon the following agreement entered upon the back of the two notes, signed by the defendant S. under date of August 19, 1841, in these words: "I hereby agree that I will not take any advantage of the statute of lim "itations on the within two notes." The court held that this agreement removed the statute bar, and that S. was technically estopped, by his agreement, from making this defence.

ASSUMPSIT on two promissory notes. The defendant filed his declaration on book in offset, judgment to account in the county court, and auditor's report, which was accepted. Plea in offset and statute of limitations, and replication — issue to the court. On trial the plaintiff introduced two notes dated March 2, 1832, and an indorsement thereon, signed by the defendant under date of August 19, 1841, in these words: "I hereby agree, that I will "not take any advantage of the statute of limitations, on the with- "in two notes."

The several signatures of the defendant were admitted to be genuine.

The county court, July adjourned term, 1851, — PIERPOINT, J., presiding, rendered judgment for the plaintiff to recover the amount of the notes and interest, deducting the indorsements and the amount of the balance due on book account as reported by the auditor, and his costs. Exceptions by the defendant.

H. G. Edson for defendant.

1. The first question that arises in this case, is, was the contract made by the defendant on the 19th day of August, A. D. 1841, a valid contract? It is insisted that it was not; being without consideration it is void.

The plaintiff for more than two years before that time had no cause of action against the defendant; no consideration passed at the time, and it was a mere *nudum pactum*.

2. In the written agreement it is contended that there is neither an acknowledgment of any debt due, or promise, express or implied, of payment. The agreement being in writing and without

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ambiguity, must if not void, be construed according to its plain import. *Carruth* v. *Paige*, 22 Vt. 179. *Phelps* v. *Stewart*, 12 Vt. 256. *Allen* v. *Webster*, 15 Wend. 284. *Bell* v. *Marison*, 1 Peters 351.

3. It is contended, that the plaintiff not having replied the agreement by way of estoppel, he cannot avail himself of it here. *Allen* v. *Webster*, 15 Wend., page 289.

H. R. Beardsley for plaintiff.

The agreement of August 19, 1841, cannot be construed to import anything less than an unqualified admission that the note was then a subsisting debt, and that he was willing to pay it. In short, that he thereby intended to waive and did waive the protection of the statute.

Language similar to this has been held to import a promise to pay. *Gardner* v. *McMahon*, 43 Com. Law Rep. 867. *Paddock* v. *Colby*, 18 Vt. 485.

The opinion of the court was delivered by

Isham, J. The plaintiff has brought his action upon two promissory notes dated March 2, 1832, executed by the defendant to the plaintiff, and to which the defendant has plead the statute of limitation, that the cause of action did not accrue within six years, and upon which issue is joined.

The evidence upon which the plaintiff relies to remove this statute bar, is the agreement entered on the back of the notes, signed by the defendant under the date of August 19, 1841, in these words: "I hereby agree that I will not take any advantage of the statute "of limitations on the within two notes." It is claimed by the defendant that this writing is not sufficient to revive the debt. That it contains no acknowledgment that it is due, or a promise to pay, and that an acknowledgment to take a case out of the statute of limitations, must contain an unqualified and direct admission of a present subsisting debt, and from which a promise to pay the same can be found.

It is evident that in making that agreement the defendant intended to place in the hands of the plaintiff sufficient evidence to protect his claim from the operation of the statute, and that the plaintiff in taking this agreement supposed that his claim was

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saved thereby from its operation. It is just and reasonable, therefore, that such an effect should be given to this agreement, if it can be consistent with established rules of law. The language of Lord Denman in the case of *Gardner* v. *McMahon*, 43 Com. Law Repts. 870, has a direct application to this case: "that it "may well be supposed that the creditor on his part, has forborne "to sue, *relying upon this undertaking* as preserving his right of "action in future." It is equally to be presumed that the creditor, *in the same reliance*, has permitted to pass from his possession the evidence to prevent the operation of the statute, which he might have controlled previous to the execution of that agreement. The defense, if available, is a violation of the defendant's agreement, and we entertain no doubt that he is concluded thereby. In the case of *Paddock* v. *Colby*, 18 Vt. Rep. 485, the defendant used this language: "that he had assured the plaintiff "that he would not take advantage of the statute of limitations," and the court held that the claim was saved from its operation. In the case of *The Utica Insurance Co.* v. *Bloodgood*, 4 Wend. 652, the defendant signed a written agreement in these words: "I hereby agree not to plead the statute of limitation," &c., and SUTHERLAND, J., said: "The defendant is *estopped by his stipu-* "*lation* from availing himself of the statute of limitations." These authorities are satisfactory upon the *effect* that should be given to the writing upon the back of the notes, for it is an agreement by the defendant that the notes shall be placed upon the same footing as if the statute had not run on the claims, the notes then furnishing the evidence of the debts, and the promise to pay.

The admission of this testimony is objected to, under the issue as formed in this case, and if the writing has the effect to prevent the operation of the statute. It is claimed, that it should have been replied by way of estoppel, as intimated in the case of *Allen* v. *Webster*, 15 Wend. Rep. 289.

Whether it is proper evidence under this issue depends upon the construction which should be given to the words so written, and whether they contain an express or implied acknowledgment that the debt is due, and a willingness on the part of the defendant to pay it. If with this writing there had been a protestation that the claim was unjust, the statute would prevail, as was decided in *Carruth* v. *Paige*, 22 Vt. Rep. 180. *Allen* v. *Webster*,

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15 Wend. Rep. 284, and *Phelps* v. *Stewart*, 12 Vt. Rep. 256, as there would be wanting evidence of a willingness and promise to pay on the part of the defendant. But where the writing is unconditional in its terms and unaccompanied by any such protestations, then it does contain such an acknowledgment and affords evidence of such a promise as will prevent the operation of the statute under this issue.

In the case of *Gardner* v. *McMahon*, we find a construction given to similar language. Lord DENMAN, C. J., says that when the debtor uses the language, "I will waive the statute," it contains an acknowledgment of the debt and a promise to pay. PATTERSON, J., says that these words standing alone, make a promise, and will avoid the statute of limitation; and with this construction Williams and Wightman, Justices, agreed. And it is to be observed that this evidence was received under the same issue as formed in this case.

The construction thus given to this writing, and which we feel disposed to adopt, disposes of the question made in this case, that the writing is ineffectual, being made after the statute had run on the notes. For if the debtor by any language acknowledges the debt and expresses a willingness to pay it, the debt is revived, though the statute has run on the claim. We think, also, that the defendant is technically estopped by this agreement from making this defense.

The result is, that the judgment of the county court must be affirmed.

THE STATE TREASURER *v.* JOSEPH FRIOTT AND WILLIAM Y. WEIGHTMAN, ADM'RS OF THE ESTATE OF GUY FLETCHER.

Scire Facias. Misjoinder. Demurrer. Judgment.

Scire facias against one of two joint recognizors, and the administrators of the other, is clearly a misjoinder, and may be taken advantage of on demurrer, where it appears upon the face of the declaration.

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SCIRE FACIAS against one of two joint recognizors, and the administrators of the other. The defendants demurred to the declaration. County court, September term, 1851. The court adjudged the same to be insufficient, and rendered judgment for the defendants to recover their costs. Exceptions by the plaintiff.

The facts in the case fully appear from the briefs and opinion of the court.

Geo. F. Houghton for plaintiff.

This is a judicial process issued against the defendants, citing them to show cause why the State Treasurer should not have an execution against the said Joseph Friott and an execution against the goods and chattels and estate of one Guy Fletcher, deceased, now lodged in the hands of William Y. Weightman, administrator of said Fletcher.

It is based upon an antecedent judgment rendered by default, and the plaintiff contends,

1. That a *scire facias* lies only to obtain execution of a judgment, or in personal actions, to revive a judgment. It lies not at common law; but it was first introduced, and its nature declared, by the statute.

2. The stringent rules of pleading relative to the non-joinder or misjoinder of parties, can, therefore, have no bearing upon this kind of process. Although one principal and the administrator of the other are cited into court in one citation, it does not follow that they must be included in one judgment or one execution. The prayer of the *scire facias* is, that the State Treasurer may have an execution against Friott, and may also have one against the goods, chattels and estate of Fletcher, now in the custody of his administrator.

3. Whenever there is a change of parties, by marriage, bankruptcy or death, whereby other persons become interested in the execution of the judgment, a *scire facias* is necessary to make such new person a party to the judgment.

As for instance, where a feme sole plaintiff, after a report of referees in her favor, married, and a judgment was entered upon the report and execution issued, without a *scire facias* having been issued to make the husband a party, the execution was set aside for irregularity. *Johnson* v. *Parmlee*. 7 Johnson's R. 271.

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H. E. Royce for defendants.

1. The action of *scire facias* is governed by the rules of pleading applicable to other actions, *ex contractu*, and we believe the law is well established, that where the contract counted upon was joint and several, the executor or administrator of a deceased party cannot be joined with the survivor. 1 Chitty on Pleading, p. 30.

2. That a misjoinder of this kind can be taken advantage of by demurrer, where the objection appears on the face of the pleadings, we believe is equally well established. 1 Chitty's Pleading, 44 and 203.

3. The State is to be treated like any other creditor of the intestate. Hence it follows, that the allowance of the claim declared on by the commissioners appointed to allow claims against the estate, was a prerequisite to the right of recovery thereon.

By the Court. This is a *scire facias* against one of two joint recognizors, and the administrators of the other.

This is clearly a misjoinder and may be taken advantage of on demurrer, when it appears upon the face of the declaration. The plaintiff can have but one judgment, and that judgment must be against both defendants, and no judgment of that kind could properly be rendered against both these defendants, as one of them is not personally liable. Judgment affirmed.

Gardner Green, Joseph Blake and James M. Tabor *v.* Alanson M. Clark, Administrator.

Probate Court. Appointment of Administrator. Appeal.

The statute provision requiring the final decision consequent upon an appeal, to be certified back to the probate court, is for the purpose of enabling the probate court to conform its action to the law of the case as settled upon the appeal; rather than to restore jurisdiction or to furnish notice to that court of the general result of the appeal.

Where an appeal had been taken from a decree of the probate court establishing a will, and a final decision against the will, (which was the only matter involved

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in the appeal,) had been regularly made, some eight years before the appointment in controversy, it appearing that the estate was not adapted to a special and limited administration, but demanded one with the ordinary powers and responsibilities, it was held, that the probate court could rightfully grant the administration which was needed, though the judgment annulling the will had not been certified to that court in obedience to the statute.

APPEAL from a decree of the probate court appointing an administrator of the estate of Thomas Clark, deceased.

The appellants set forth in their plea "that the said Alanson M. Clark ought not to be appointed administrator of the estate of the deceased, because the said Thomas Clark did not die intestate, but on the contrary thereof, in his life time made and executed his last will and testament, and therein appointed Cary Clark his executor, and that said Cary duly presented said will to the probate court for the district of Georgia, &c., and that said court on the eleventh day of July, A. D. 1840, did decree that said will and testament was a valid instrument, duly proved as the last will and testament of the said Thomas Clark, deceased.

The defendant in his replication set forth that he ought not to be barred, &c., because the said Thomas Clark in his life time did not make and execute any will or instrument, but died intestate, though true it is, that said Thomas did attempt to make a will and testament, and therein appoint said Cary executor, but said instrument was not executed in due form of law, and that said decree of the probate court was appealed from on the 23d day of July, 1840, to the county court next to be holden at St. Albans, within and for the county of Franklin, that such appeal being granted by the probate court, was duly entered in the county court, on the second Tuesday of September, A. D. 1840, that such proceedings were had thereon in due form of law, that said case was continued from time to time until the September term of said court, A. D. 1841, when the said county court, upon a hearing of said appeal, did give judgment that said instrument was not the last will and testament of the said Thomas Clark, deceased, and that said decree of the probate court be reversed, which said decree of the county court was duly certified back to the said probate court on the tenth day of September, A. D. 1850, by Joseph H. Brainard, county clerk of the said county court, and on the eleventh day of September, 1850, was duly filed and recorded in said probate court, &c.

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The appellants in their rejoinder set forth that after the granting of the appeal, as in said replication mentioned, and after said appeal was duly entered in said county court, said probate court was divested and ousted of all jurisdiction in regard to the appointment of executor or administrator, except as is provided by law, to wit, (to appoint an administrator to take charge of said estate until said appeal was decided,) until the final decision and judgment upon said appeal should be certified to the said probate court from the county court, &c. That said probate court, before said decision and judgment was certified to said probate court, to wit, on the eighth day of May, A. D. 1849, did decree that the said Alanson M. Clark be appointed administrator upon the estate of the said Thomas Clark, deceased, in full and without limitation, &c.

To this rejoinder the defendant demurred. The county court, September Term, A. D. 1850, sustained the demurrer, and adjudged the rejoinder insufficient. To which decision the appellants excepted.

Stevens & Edson for appellants.

B. H. Smalley and *A. O. Aldis* for defendant.

The opinion of the court was delivered by

Royce, Ch. J. This was an appeal from a decree of the probate court, appointing Alanson M. Clark administrator upon the estate of Thomas Clark. And the question presented by the pleadings is, whether an administrator for general purposes could legally be appointed, before the decision of the county court upon a former appeal, disallowing the will of Thomas Clark, was certified to the probate court.

The statutes regulating appeals from probate courts have uniformly required that the final decision consequent upon an appeal shall be certified back to the probate court; and that the subsequent action of the probate court shall be in conformity to such decision. This latter requirement indicates the reason and ground of the former. Where the decision of the appellate court embraces various subjects, or is qualified by special limitations or conditions, the probate court might be unable, without the certifi-

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cate, or other evidence from the record equally full and authentic, to conform its action to the law of the case as settled upon the appeal. And we consider that the certificate was enjoined to obviate such embarrassments, rather than to restore jurisdiction to the probate court, or to furnish notice to that court of the general result of the appeal. It may be further remarked, that no statute has declared the effect, in case the judgment is not so certified. We therefore incline to the opinion, that the want of such a certificate is in no case a legal bar to proceedings in the probate court, though upon subjects affected by the decision of the appellate court; that although it may occasion embarrassment, the court can nevertheless act with effect, if its action is warranted by the law and fact as they really exist at the time.

In this instance, it is true, that whilst the former appeal was pending in the county court, or until the invalidity of the will was judicially settled, none but a special administrator could be appointed to collect and take charge of the estate for the time being. But a final decision against the will, which was the only matter involved in the appeal, had been regularly made, some eight years before the appointment now contested. After that decision the condition of the estate was not adapted to a special and limited administration, the occasion for which had passed, but demanded one with the ordinary powers and responsibilities. And under the circumstances, we think the probate court could rightfully grant the administration which was needed, though the judgment annulling the will had not been certified to that court in obedience to the statute.

Judgment of the county court affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF GRAND ISLE,

JANUARY TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

JOSEPH GOSLIN *v.* THOMAS HODSON AND HENRY FISK.

Book Account. Master-builder. Payment pro tanto. Tender.

Where the plaintiff recommended himself as a competent workman and undertook to work as a master-builder, and through negligence or unskilfulness the defendant suffered loss, to a greater amount than the sum due for his services at the stipulated rate, held, that the plaintiff cannot recover for his labor.

The acceptance of money paid into court, operates as a payment, *pro tanto*, and also as a conclusive admission of the conditions upon which it was paid into court.

Money paid into court, not in pursuance of a tender made before the suit is brought, must, to be available, include the costs in the suit up to that time.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows.

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The plaintiff, being a carpenter and joiner by trade, offered himself to the defendants as a competent mechanic to build them a crane, to be placed on their dock at Isle La Mott, for convenience in loading heavy blocks of marble and other freight on board of vessels along-side of the said dock, and agreed with defendants to build for them on their said dock a good crane, and the plaintiff was to be paid therefor one dollar per day for his labor by the defendants.

Under this agreement the plaintiff worked twelve days for the defendants, and during said time the plaintiff built the crane and worked five of the said twelve days in enlarging and fitting the dock for the reception of the said crane.

After the crane was raised the defendants objected, that the crane was unskilfully constructed, and declined paying the plaintiff for his labor. About the 17th of July, 1846, the plaintiff commenced an action on book against the defendants. After the commencement of the said suit, but whether one or two days before the time set in the writ for trial did not appear, the defendants tendered to the plaintiff the sum of $2,50 in satisfaction of the plaintiff's claims, which sum the plaintiff refused to receive. On the day of trial in the justice court, the defendants brought into court $2,50 and insisted on it as a tender. After the jury had rendered their verdict in the cause, the foreman of the jury observed, that the $2,50 belonged to the plaintiff, the justice took the money and handed it to the plaintiff, he, in the absence of his counsel, received it and carried it out of court. The plaintiff, after consulting his counsel, and the next morning after the said trial, returned the money to the justice. At the time the tender was made, the plaintiff's costs which had then accrued was ninety-two cents. The auditor also found that the crane was defective, by reason of the unskilfulness or negligence of the plaintiff in constructing it, and that the defendants sustained damage thereby, to an amount of more than the unpaid balance of the plaintiff's account. The defendants charged in their account for taking down the said crane and framing it over, also for delay in the use of the said crane, which items the auditor decided could not be adjusted in this form of action. The auditor decided that there was nothing due from the defendants to the plaintiff, to balance book account between them.

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The county court, February term, 1851,—BENNETT, J., presiding,—accepted the report and rendered judgment thereon for the defendants. Exceptions by plaintiff.

F. Hazen for plaintiff.

G. Harrington for defendants.

The plaintiff was a professed mechanic, and in that character contracted to build the defendants a good crane, in consideration that they would pay him one dollar per day for his work; these were dependent contracts; the plaintiff cannot pocket his dollar per day, and then turn the defendants over, to his irresponsibility, for the damage they have sustained.

The plaintiff's labor having been bestowed upon fixtures, he may be legally entitled to recover for so much benefit as he has bestowed upon the defendants above the injury he has inflicted. *Dyer* v. *Jones*, 8 Vt. 205. *Taft* v. *Montague*, 14 Mass. 282. *Gilman* v. *Hall*, 11 Vt. 510. Chit. on Cont. 569.

BY THE COURT. It seems from the facts reported by the auditor, that the plaintiff recommended himself as a competent workman and undertook to work, as a master-builder; and through his negligence or unskilfulness, the defendants suffered loss to a greater amount than the sum due for his services at the stipulated rate. We think this will defeat the action. The plaintiff having accepted the money paid into court, it must operate as a payment, *pro tanto*, and also as a conclusive admission of the conditions upon which it was paid into court. But this will not place the plaintiff in any worse condition than if he had withstood the defendants' offer of the money. For in that case he might have been compelled, by rule of court, to accept the money paid into court, at any time, or proceed, at the peril of paying costs after that time, in the event of his not recovering more than was offered under the rule. But this must be understood with this limitation, that money paid into court not in pursuance of a tender made before the suit is brought, must, to be available, include the costs in the suit, up to that time. Judgment affirmed.

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AMOS A. WRIGHT *v.* A. B. HAZEN AND BENJ. GORDON.

Estoppel. False imprisonment. Jurisdiction of justices. Habeas Corpus.

If one assume to justify, by special process of *capias*, he should in his plea, state such facts, as justify that form of process.

Estoppels, to be available, where there is more than one party, must be mutual, and can only operate upon the parties to the issue, and those who stand in privity of estate or descent.

In a suit against a justice for false imprisonment on a *capias* that he signed; all that is requisite for him to show is, that the original writ described the debtor as a non-resident, and that he signed the writ supposing such to be the fact.

Sound policy requires, in this State, that the same rule of construction be extended in favor of the jurisdiction of justices of the peace, as is done in favor of courts of general jurisdiction.

An execution *prima facie* should follow the writ.

If new facts arise before the issuing of an execution, by which the debtor is entitled to have it issue against his goods and chattels only, he may pursue his right on *habeas corpus*.

THIS was an action on the case for false imprisonment. The defendants plead—first, the general issue, and secondly, a plea in bar—that defendants in this suit caused the plaintiff to be committed by virtue of legal process, and that defendant Gordon was a justice of the peace, &c. The plaintiff, in his replication, replied that said writ was issued without the requisite formalities, and that the plaintiff, in this action, was a resident citizen of this State at the time of his committal upon said process.

The defendants, in their rejoinders, replied that the plaintiff ought to be estopped from pleading said last mentioned plea, because the plaintiff, in their suit, (the defendant Hazen being plaintiff in that suit, and defendant Gordon was the justice before whom said suit was made returnable,) had under the provisions of the act of 1849, pleaded said facts in abatement before the said justice Gordon, to whom said process was returnable, and that said justice rendered judgment against this plaintiff, on said plea.

The county court, August Term, 1851, on demurrer rendered judgment that said rejoinders are sufficient. Exceptions by the plaintiff.

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G. Harrington for plaintiff.

The proposition that the judgment of Gordon, as a justice should estop the plaintiff from avering and proving, that he was a resident citizen is without legal foundation. The 67th Sec. of Comp. St. chap. 31 p. 251, has in general terms prohibited the *arrest or imprisonment of resident citizens*; notwithstanding the proviso, there is no longer any general authority in clerks and magistrates to issue writs of *capias* on contracts made after January, 1839, consequently, this process against the body of Wright, issued and served on the 22d of March, 1850, was *void* process, it was not only issued without law, but against a *positive* statute. The writs being void, all the proceedings under it was *coram non judice*; a court must have jurisdiction of the process, as well as the person and the subject matter, and in this case, for want of the jurisdiction of the first he failed to have jurisdiction of the latter. *Aiken* v. *Richardson*, 15 Vt. R. 500. *Perkins* v. *Proctor & Green*, 2 Wilson R. 385. *Persons* v. *Loid*, 3 Wilson 341. *Baker* v. *Broham & Norwood*, 3 Wilson 368.

In the case of a blank deputation, afterwards filled up, as well as one wrongly inserted in a county court writ, as in the cases of *Kelly* v. *Paris et al.*, 10 Vt. 261; *Ross* v. *Fuller*, 12 Vt. 265; *Dolbear* v. *Hancock*, 19 Vt. R. 388, this court held, that the services were *void*, and that the doings of the deputed persons were trespasses. Could any after adjudication, in those cases have been pleaded as an estoppel in those actions, for trespasses committed by the deputed persons?

The defendants pleas and rejoinders fail to answer the plaintiff's writ and replication, and for that cause are bad.

The plaintiff has alledged in his replication, the illegality of issuing the execution and his imprisonment upon it, while he was a *resident citizen*, and to this part of the case the defendants make no excuse except the judgment of the defendant Gordon, of the 15th of April, 1850. The plaintiff might have been a *non-resident* on the 22d of March, the time of the serving of the writ, to which time the plea in abatement must have related, and have been a *resident citizen* on the 15th of April, when the execution was issued. See *Sawyer* v. *Vilas*, 19 Vt. R. 43 and note. The legal construction of the act of 1843, Comp. St. p. 251, Sec. 68, is, that the writ of execution is placed on the same footing of *mesne process*

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and an affidavit must be filed to make an execution valid against a resident citizen's body, the same as in case of *mesne process.* 2 Wilson R. 3. *Scott* v. *Dixon and notes,* 1 Saunders R. 299.

Stevens & Edson and *Sowles* for defendants.

For the defendants it is contended, that the plaintiff, having under the statute of November 12, 1849, submitted the question in dispute to a court of competent jurisdiction, the decision of that court is conclusive, and that he is estopped from again litigating the point so decided. *Trevivan* v. *Lawrence et al.,* 2 Smith's Leading Cases 486.

By the Court. To state the points involved in this case in the briefest manner, it appears to us,

1. That the estoppel relied upon by the defendant, who was a party to the original suit, is conclusive as to him, and when replied by him separately, is available. But it can only defeat the plaintiff's replication, and thus leave the defense to stand upon the defendants' plea.

2. The plea of this party, Hazen, it seems to us is defective, in not containing an allegation, that the plaintiff here, at the time of praying out process, in the original action against him, was a non-resident. The common form of civil process now, being that of summons or attachment of goods, &c. if one assume to justify, by virtue of special process of capias, he should, in his plea, state such facts as justify that form of process.

3. As to the justice Gordon, it seems to us the estoppel is not available as such, in his behalf. He not being a party to the former issue, would not be bound where the finding was against, and cannot, therefore, take advantage of a finding in his favor, inasmuch as estoppels must be mutual, and can only operate upon the parties to the issue, and those who stand in privity of estate or descent.

This will leave the case to stand, as to him, upon his plea and the plaintiff's replication, which will make it substantially bad, without regard to the form of pleading, as it will show that the plaintiff was a resident citizen at the time the writ issued. This will entitle the plaintiff to have judgment, in his favor, on the pleadings.

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But as it is probable a repleader may be desired, we will suggest our view of the law arising upon the other questions discussed.

1. As to the justice, it seems to us all that it is requisite for him to show is, that the original writ described the debtor as a non-resident, and he signed the writ supposing such to be the fact, having no mode of trying that question in advance. But we are aware that the decisions in New York, and probably in some of the other States, have required the justice to know the facts, limiting the extent of his jurisdiction, at his peril. But no such rule has ever been applied to courts of general jurisdiction either in Westminster Hall, or in this country, and the jurisdiction of justices of the peace has become so important and extensive, that we incline to believe sound policy requires us to extend the same rule of construction in favor of their jurisdiction, which is done in favor of courts of general jurisdiction. Any distinction, in the particulars now before us, would be very unreasonable, not to say more.

2. In regard to the execution, *prima facie*, it should follow the writ. The provision in regard to executions being included under the general term writ found in the statute, is intended to enable the creditor to swear out a capias execution, if he finds himself entitled to one. And if new facts arise before the issuing of an execution, by which the debtor is entitled to have it issue against his goods and chattels only, he may pursue his right on *habeas corpus* and perhaps in other modes.

Judgment reversed and repleader awarded on terms.

The Probate Court *v.* David Strong.

Probate Bond. Prosecutor. Waiver of Statute provisions by defendant.

When an applicant prosecutes a bond, as provided in the Compiled Statutes, p. 374, Sec. 2, having obtained permission from the probate court, and neglects to cause his name to be indorsed on the writ, as prosecutor of the same; if the defendant goes to trial on demurrer to the declaration, or has a trial on the merits, and the case passes to subsequent terms of the court, it is a waiver of the objection.

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And where the applicant at the time of the return of the writ, lodges a certified copy of the bond, and a certificate that permission has been granted to prosecute the bond, with the clerk, it is sufficient to give him all the rights of a prosecutor, though the clerk neglects to make his entry of the same.

THIS was an action on a probate bond, and judgment for the plaintiff, at the February Term of the county court, 1851, to which judgment exceptions were taken by the defendant. After which the defendant filed his motion to dismiss, for the following reasons: "That no applicant has caused his name to be indorsed on the "writ which has been sued out on the probate bond, and is now "pending in this court, as prosecutor. Nor has any applicant re- "turned to, and filed in this county court, to which said writ was "returnable, at the time of the return of said writ, the copy of the "bond, and certificate furnished by the probate court, as required "by the second section of the fifty-sixth Chapter of Revised Stat- "utes of this State." On the trial, it appeared that the prosecutors filed with the clerk of the court, at the entry of this cause, a certificate from the court of probate, and that a certified copy of the defendant's bond had been in the files of the case during the pendency of the suit, but not filed upon the clerk's docket, until August Term, 1851. It did not appear that Edwin A. and Wallis H. Webster, who claimed to be prosecutors of the said bond, had ever caused their names to be endorsed upon said writ. On their part it was contended, that the defendant's motion to dismiss was too late, &c. The court, August Term, 1851, sustained the motion, and ordered said cause to be dismissed as to the said prosecutors. To which decision they excepted.

G. Harrington for the plaintiffs.

The motion to dismiss was interposed *too late;* if the objections were ever of validity, they were so the first term the suit was entered; such bonds can only be prosecuted upon application of a prosecutor. Each requisition of the statute which forms the subject of the defendant's motion, has special reference to the time of entering the cause, and no subsequent event, and falls clearly within the rule of dilatory pleas, which can only be taken advantage of the first term of court.

Stevens and *Edson* for defendant.

The statute is mandatory, any other construction would deprive

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the defendant of rights and privileges which the law has secured to him.

The opinion of the court was delivered by

ISHAM, J. This motion to dismiss was filed at the February term of the county court, at the third term after the case was entered upon the calender of that court. The motion is urged upon the ground that no applicant has caused his name to be indorsed as prosecutor on the writ, nor returned to, and filed in that court at the time of the return of the writ, a copy of the bond and certificate furnished by the Probate Court.

We learn from the exceptions which were allowed on trial at the August term, 1851, that at the time the suit was entered, the prosecutor filed with the clerk a certificate from the Court of Probate, and that a certified copy of the bond has been in the files of the case during the pendency of the suit, but not entered upon the clerk's docket until time of trial, when the exceptions were allowed.

The Comp. Stat. p. 374, Sec. 2, provides that the Probate Court on application shall grant permission to prosecute the bond and shall furnish to the applicant a certified copy of the bond, and a certificate that permission has been granted to prosecute it, and requires of the applicant, that they be filed in court, at the return of the writ, and that he cause his name to be indorsed on the writ as the prosecutor of the same. No objection is urged, but that the certificate is good in form, but the applicant has neglected to indorse his name on the writ, and if this objection had been taken at the first term of the court, it probably would have prevailed. But if, as in this case, the party goes to trial on demurrer to the declaration, or has a trial on the merits, and the case passes to subsequent terms of the court, it is a waiver of the objection, and the party is too late in filing this motion. And in relation to the certificate, the prosecutor has done all he personally was required to do in relation to filing the bond and certificate, as it was lodged with the clerk when the case was entered in court, and nothing remained but the act of the clerk in making his entry thereon. We think that lodging a certified copy with the clerk at that time by the prosecutor, was sufficient to give him all the rights of a prosecutor under the act, and that the suit cannot be defeated by such neglect of the clerk.

The motion to dismiss is overruled and the case remanded.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF ADDISON,

JANUARY TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

JOSIAH BIGELOW & CO. *v.* HENRY W. WALKER.

Factors.

In absence of special directions as to price, a factor is to sell for the fair value or market price; and if the factor acts in utter disregard of his duty as factor by selling at an under price, he will be compelled to account for the goods at their fair value or market price.

When A. turned out or pledged goods to B. with an understanding that B. should dispose of them through the agency of a factor and credit A. the amount of sales, and B. committed the goods to a factor to be sold, and took his receipt for them, it was held that B. was the proper party to resort to the factor for the performance of his contract.

And it was also held, that whatever amount was rightfully due from the factor may be considered in the nature of a fund provided by A., to be applied in satisfaction of his indebtedness to B., and that B. was not at liberty wholly to disregard it, and claim the entire balance of his debt of A., as if no such means of satisfaction had ever been at B.'s command.

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Book Account. Judgment to account was rendered in the county court, and an auditor appointed. The facts reported by the auditor sufficiently appear in the opinion of the court. The county court, August Adjourned Term, 1851,—Pierpoint, J., presiding,—rendered judgment upon the report for plaintiffs. Exceptions by defendant.

E. N. Briggs for defendant.

The plaintiffs received the cloth and had it receipted to themselves, had it sold, but rendered no account of sales.

The auditor finds that the cloth was worth eighty-seven and a half cents per yard, and the defendant is only credited with about half that sum per yard.

J. Prout and *E. D. Barber* for plaintiffs.

The defendant's account in offset presented only a question of fact, whether the plaintiffs were not bound to produce the account of sales rendered by Bush & Wilds. Their statement in writing would be no more admissible than their verbal statement, and was wholly immaterial, as the question was as to the amount received by the plaintiffs, on account of their sales.

The opinion of the court was delivered by

Royce, Ch. J. Several questions were presented by the auditor's report in this case which are now waived; and the only matter at present in controversy is a claim on the part of the defendant, to be allowed the amount of his charge for 204 yards of cloth, or a sum considerably larger, at least, than the amount credited by the plaintiffs for the proceeds of the same cloth.

The defendant insisted before the auditor, that the cloth was delivered to the plaintiffs upon a direct sale at its market value. But such a sale is negatived by the report; and the defendant's claim must depend upon the arrangement for effecting a sale of the property through the agency of Bush & Wilds. The contract on that subject is neither fully nor distinctly stated in the report, and much is left to implication and inference from the facts detailed. It is apparently of no importance that the commission-house of Bush & Wilds was selected or suggested by the defendant. That circumstance could not affect the measure of their ac-

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countability, nor would it show with which of these parties they really contracted. Were a loss to be borne in consequence of their insolvency, the fact might then become important.

So far as the auditor attempts to describe the contract the substance of his finding is, that the plaintiffs were to account for the cloth, by crediting the defendant with the amount of sales to be received from Bush & Wilds, deducting their commission. But it might happen that, by making improper sales, or by misrepresenting the sales made, those persons would become justly answerable beyond the amount reported by them to the plaintiffs. In that event the plaintiffs would not realize as large a payment as they should receive, nor would the defendant get the proper equivalent for his goods. And if the plaintiffs should merely credit the defendant, in such a case, with the amount so reported and paid over, they would not account to him for the property in that true and just sense which the parties must have intended. Hence it is apparent, that the mode adopted for accounting, as between the plaintiffs and defendant, was based upon the assumption that the factors would fully and properly discharge their duties. And should they violate their duty, so that full justice could not be done to the defendant, by simply giving him credit in the manner contemplated, the question would then arise, which of these parties should resort to the factors for a further and more just accounting. We make no question but that the defendant, as general owner of the property, *might* in such case enforce a remedy of some kind against them; and yet, as the facts of this case appear, we think the plaintiffs would more properly be the parties to call them to account. They would certainly have all the power required for that purpose. For although we are not to understand that they became the owners of the cloth by purchase, they nevertheless acquired an interest in it, as the means from which to realize a speedy payment upon their debt. They received it substantially as a pledge, with the right of immediate sale. They committed it to the factors to be sold, taking their receipt for it. And as the plaintiffs did this in their own name, and with the defendant's assent, they became invested with the paramount right, as between themselves and the defendant, to require of the factors a full and just accounting. And we think it should be inferred that they were to exercise that right for the

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benefit of themselves and the defendant, unless there was some express stipulation to dispense with active diligence on their part, or unless their debt should be otherwise satisfied. Perhaps they might also be excused by seasonable notice to the defendant of the account of sales furnished by Bush & Wilds, and an offer to relinquish in his favor all further claim against them. At present there is nothing in the case to repel the inference of this obligation on the part of the plaintiffs. The only express contract of the factors which appears was with the plaintiffs; and the defendant had a right, for aught that the case discloses, to insist that a due performance of that contract should be required. We therefore conclude, that the plaintiffs have been, and still are, the proper parties to resort to the factors.

It only remains to enquire whether Bush & Wilds have sufficiently accounted. And it is manifest that they have not, if we take the value and selling price of such cloth to have been as found by the auditor. Those persons are nowhere spoken of as auctioneers, but only as commission merchants or factors. And, in the absence of special directions as to price, a factor is to sell for the fair value or market price. Smith's Com. Law 105, Paley on Ag. 26. The cloth in question is found to have been worth, when committed to the factors for sale, eighty-seven and one-half cents per yard, as tested by the sales of cloth of like quality and description in the markets of Boston and New York. But the account of Bush & Wilds, as rendered to the plaintiffs, would represent the sale of this cloth at about one-half of that price. And hence the necessary inference would seem to be, that they acted in utter disregard of their duty as factors, by selling at such an under price, or that they rendered a false and fraudulent account of the actual sales. In either case, justice would require that they be compelled to make an additional compensation for the property. Now, whatever amount is rightfully due from them, may well be considered in the nature of a fund provided by the defendant, to be applied in satisfaction of his indebtedness to the plaintiffs. And as the plaintiffs appear to have always had the superior right to pursue that fund, we think they were not at liberty to wholly disregard it, and claim the entire balance of their debt, as if no such means of satisfaction had ever been at their command. The judgment of the county court is therefore re-

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versed. And the cause will be recommitted to the auditor, to ascertain what further allowance, if any, should be made to the defendant.

JOHN LOOMIS *v.* DANIEL LINCOLN.

Lien. Demand.

When A. hired a piece of land of B. for which he was to pay B. a certain price per acre for the use of the land that season and the stalks after the corn was harvested, it was held, that B. had no *lien* upon the corn for the payment of the price agreed upon, and that B. was a wrong-doer in taking the corn, hence no demand was necessary before suit brought.

TROVER for a quantity of corn. The case was referred under rule of court, and the referees reported substantially the following facts.

That sometime in the sping of 1849, the plaintiff and one John Dow hired of the defendant for a certain price per acre, three or four acres of land to be planted to corn, and the defendant was to have the stalks. The plaintiff and said Dow divided the land equally between them, with the understanding that each should plant, cultivate and harvest his own portion of said division. The said Dow went on, cultivated, harvested and paid the defendant for the use of the same according to the price agreed upon. The plaintiff proceeded to do the same, and commenced by himself or agents, to harvest the corn, and after harvesting a small portion of it, the defendant went on to the land and harvested the remainder, claiming to have a *lien* on the same, and still retains the same in his possession. The referees found that there was no express agreement between the parties, by which the defendant was entitled to a *lien* upon the corn for the use of the land. The defendant contended that as he, by the agreement, was to have the stalks, they were tenants in common of the standing corn, and also that a demand was necessary before suit. The referees found the defendant guilty. The county court, December term, 1851,—PIERPOINT, J., presiding,—rendered judgment upon the report for the plaintiff. Exceptions by the defendant.

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Geo. W. Grandy for defendant.

We say that no tort has been committed in obtaining possession of the property sued for. And it appears by the report, that the corn is still in possession of the defendant, and that no *demand* has been made for it.

To entitle the plaintiff to maintain his action of trover, he must of course prove either a *tortious* taking, or a *conversion* of the property. In this case the report shows neither.

J. Prout for plaintiff.

1. No *lien* exists upon the facts reported. *Cummings* v. *Harris*, 3 Vt. 244. *Bendict* v. *Murray*, 3 Vt. 302. *Chase* v. *Wertman*, 5 M. and S. 180.

2. Neither were the parties tenants in common of the crop in question; the defendant had no interest in it, nor in any portion of it, and consequently no right to sever it. *Hurd* v. *Darling*, 14 Vt. 214. *Aiken* v. *Smith*, 21 Vt. 173.

The opinion of the court was delivered by

Isham, J. From an examination of this case, we think the judgment of the county court must be affirmed. The defendant under his contract with the plaintiff had no title to the crops grown upon the ground either in severalty or as tenant in common. The plaintiff was to give the defendant a certain price per acre for the use of the land that season, and the stalks after the corn was harvested. But until the corn was harvested and the stocks delivered, the matter rested in contract, and for which, in case of non-delivery, an action would lie. Before delivery the plaintiff was the only person who had that interest in the stalks that would enable one to sustain trover for their conversion. The defendant, therefore, in entering upon the land and taking possession of the corn was a wrong-doer, and still so remains in retaining the possession of the same from the plaintiff. The referees have found that the corn was taken by the defendant under a supposed lien for the payment of his claim, and that he under the same idea still retains it, as he refused to deliver it to one Crampton who had negotiated for the purchase of this property of the plaintiff, as he did not know at that time the exact amount of his debt. Such a lien does not exist unless such was the contract between the plaintiff and the defendant.

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The existence of this lien has not been contended for in argument. But it is urged that there should have been a demand before suit brought. As, however, the defendant was a wrong-doer in the original taking, no demand was necessary. The illegal taking of this property was a conversion, for which this action will lie.

JOEL BATTY *v.* TOWN OF DUXBURY.

Towns to make By-ways. Primarily liable. By-way an open public way. Obstructions in highways. Towns and travelers.

Towns must, when railroads obstruct their highways, provide a suitable and proper by-way for the public to pass around the obstruction, and use proper and reasonable precaution to divert the travel from such highway or by-way while they remain unsafe for the public use.

And though the railroad be bound to make the by-way, and fail to make it safe for public use, this will not exonerate the town from liability, for the town is primarily liable to the traveler.

Such by-way is an open public way for the time being, and the town must make it reasonably safe for the public travel, or see that it is made so by others.

Towns are bound, after having reasonable notice of the existence of obstructions in their highways, to remove them or make safe by-ways to pass around them, or to see that they are properly made by others.

There is no necessary privity between the traveler and any one but the towns, as to the sufficiency of the highways. The towns must look to those who obstruct their highways for redress. *Willard* v. *Newbury*, 22 Vt. R. 458 confirmed.

THIS was an action in three counts, on the case for injuries sustained in consequence of the insufficiency of a highway in said town of Duxbury. The 1 and 2 counts set up the highway as being a public highway in said Duxbury, that the same was insufficient and out of repair, &c. The 3 count, "that the said highway "was then and there insufficient and out of repair, and then and "there was, and for a long space of time, to wit, six months, &c., "had been obstructed by a high embankment across said highway "where it was necessary for the plaintiff to pass in traveling said

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"highway for a short distance, to wit, fifty rods was rendered and "was then and there wholly impassable during all the time afore- "said, of all which the defendants, &c., had notice; and the plaintiff "avers that in order to travel and pass along said highway on his "said journey, the plaintiff was then and there necessarily com- "pelled, to avoid said obstruction in said highway by turning a "little out of said highway and passing around said obstruction "along by the side of and near said highway a short distance, to "wit, fifty rods, (and thence into said highway,) in a certain *open* "*public way*, in Duxbury aforesaid, and that had been constructed "for that purpose, and in which all travellers passing or traveling "said highway, then were and for a long time, &c., to wit, six "months, and during all the time aforesaid had been compelled to "travel, &c., with the knowledge and consent of said defendants, "&c., plaintiff avers that there was no other way or means of "avoiding said obstructions in said highway or of there traveling "said highway than the said open public way aforesaid, which "was constructed for that purpose, of all which, &c., the defend- "ants, &c., had notice; and the plaintiff avers that said *open way* "was then and there and during all the time aforesaid insufficient "and out of repair, as and for a highway, or for the purpose of "traveling thereon as aforesaid, &c."

Plea, the general issue, and trial by the jury, December term, 1851.

On trial it appeared and was proved, that there had been for many years a public highway in Duxbury leading east and west, and on the south side of Onion river and near the river, and was the only highway through Duxbury on said Onion river. That at the point in question said highway made a slight curve towards the river, and passed round the point of a spur of the mountain that projected down near to the river. That the accident in question happened the 21st or 22d day of February, 1850. That in the summer and fall of the year 1849, the Vermont Central Railroad Company located and constructed their road along and near said highway in such a manner, as that said railroad entered upon and occupied said highway at a point on the east side of said spur of the mountain, and thence westward to a point about 98 rods therefrom, and on the west slope of said mountain spur, making an embankment at the eastern point of intersection of from forty

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to sixty feet, and also a lesser embankment on the west end of such occupation, and utterly obstructing and occupying said highway the whole of said 98 rods, so that there was no means of passing practicably between said railroad and said river. That said railroad passed through said spur in a cut or excavation some fifteen to twenty feet deep on the upper side. That the said corporation, on occupying the said highway as aforesaid, made a way or road south of the said railroad line, and over said mountain spur, and near to their line, so as to connect the two points of said highway a distance of about 98 rods at which it had been so interrupted and occupied, which was the only way for teams to pass between said two points from early in the fall of 1849 to the 22d day of February, 1850, and during that time was so used. And the accident happened on said piece of new road so constructed by said railroad corporation, and at a point some forty rods east of the west end of said new road or way.

There was no evidence, that the town had ever recognized said new way, or done any act in connection therewith to adopt it, as a public highway, or applied to the commissioners to act on the subject; but the contrary did expressly appear. Most of the old highway interrupted lay north of the centre of said railroad.

The evidence tended to show, that part of the new way where the accident happened was insufficient, and that such insufficiency caused the accident.

The defendant offered, in connection with the charter of the Vermont Central Railroad Company, to prove that when said railroad company commenced building their said road and was making such obstruction, their right to do so was resisted by the town of Duxbury, who once removed the obstructions; and that the railroad company then threatened them with violence, and did in fact by superior force proceed to locate and build the road, as before stated, and that the same was by said railroad company claimed to be so done under the authority of their said charter, and that said town had at all times endeavored to prevent the same all in their power, and that said new road was wholly designed and constructed by the railroad company, and was on the private lands of one Davis, and without the advice or concurrence or assent of the town, and against their will, and that the same was never accepted by the town, or the selectmen, nor commis-

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sioners in the manner provided by law, and that the same was unfit to be so accepted, and that the town never had in any manner the remotest connection with said new road or way, or in any manner adopted the same.

But the court excluded the evidence and charged the jury among other things, that it was the duty of the town to have prevented the said obstructions, and if the railroad company did so obstruct the highway, it was the duty of the town to provide a sufficient by-way for travelers, and that for the insufficiency of which by-way the town was responsible.

The jury returned a verdict for the plaintiff.

The defendants after verdict moved an arrest of judgment, on the ground that there is no evidence in the case to warrant a verdict on either count for the plaintiff, and that the whole declaration is insufficient in law to sustain the verdict, which is a general verdict applicable to the whole declaration and founded on all the counts.

The court overruled the motion and rendered judgment on the verdict. To which the defendants excepted.

Kasson & Edmunds for the defendants.

1. The railroad company was authorized to construct its road so as to absorb and extinguish the highway at the point in question. Acts of 1843, p. 43, Sec. 7 and 10. *Roxbury* v. *Worcester Turnpike Co.*, 2 Pick. R. 40. *White R. Turn. Co.* v. *Vt. Central Railroad Co.*, 21 Vt. R. 590. *Commonwealth* v. *Worcester Turn. Co.*, 3 Pick. 327. *State* v. *Hampton*, 2 New H. R. 22. *Farmers' Turn. Co.* v. *Coventry*, 10 Johns. 389.

2. This permanent and entire occupation of the highway, operates as a discontinuance of it. When the highway was taken and appropriated, as stated in the case, it ceased to be the "*highway" of the town*, and no one could legally exercise dominion over it, save the railroad company. *Tinker* v. *Russell*, 14 Pick. R. 279. *Commonwealth* v. *Westborough*, 3 Mass. R. 406.

And, if discontinued, of course the "highway" could not have been "insufficient."

3. The rule is that *the locus*, where the injury happens, *must be the highway of the town*. Statute. *Lowell* v. *Moscow*, Maine R. 3 Fairfield 300. *Blodgett* v. *Royalton*, 14 Vt. 288. *Young* v. *Wheelock*, 18 Vt. 493.

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If the *locus* was the "highway" of the town, Davis could have been indicted for obstructing it; but upon the facts in the case, Davis had a legal right to fence it up, because he had not been deprived of his land according to law, therefore it was not a highway.

4. Suppose, what is not true, that the town was bound to provide a suitable by-way, did the construction of a by-way which the town refused to sanction, in any manner, make such by-way the "highway" of the town? *Commonwealth* v. *Charlestown*, 1 Pick. R. 180. *Paige* v. *Weathersfield*, 13 Vt. 424.

5. Could the town have entered, in its own right, upon the land of Davis, and constructed or repaired the by-way, without laying out a "way" as provided by law, without committing a trespass? *Warren* v. *Bunnell*, 11 Vt. 600.

6. The charter of the railroad company required a "restoration" to the "acceptance" of the selectmen, &c. This has not been made. How, then, can the railroad company foist this by-way upon the town, without complying with this condition? Even in the case of town or county roads, the town is not liable for their defects until they are adopted. *Lowell* v. *Moscow*, *Young* v. *Wheelock*, *Blodgett* v. *Royalton*, cited *ante*.

7. Could the town have been indicted, upon the facts stated, for not keeping this by-way in repair? If it could, it must be upon the ground, not only that the old way was discontinued, for no one contends that there were *two* highways side by side, at that point, but, that the by-way was the "highway" of the town.

8. Nothing less than propagandism in the law, can as we conceive, extend any legal principle or decision, to the maintenance of this action. The doctrine that is distorted and tortured into aid of this action had its origin in *Currier* v. *Lowell*, 16 Pick.

9. The railroad company had no right to build this by-way, except under the conditions of its charter, requiring appraisal and payment before occupation. By the case, then, it appears that all concerned in the construction and maintenance of this *via incognita altioris legis*, were all the time guilty of a high-handed and illegal outrage upon the rights of Davis, the land owner, and this defendant is to be punished for refusing to become a party to it, for no court will presume that land has been rightfully wrested from its owner until it affirmatively appears that the conditions of

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the law have been fulfilled. *Commonwealth* v. *Coombs*, 2 Mass. 489. *Gilbert* v. *Columbia Turn. Co.*, 3 Johns. R. 107.

Besides, it expressly appears that this by-way was on the private lands of Davis. Davis, then, had a right to shut up this by-way at the time of the accident, therefore it was not a "highway" that the town was bound to repair. *Hodgett* v. *Royalton*, and cases *ante*.

As to motion in arrest, the 3d count is bad as showing the accident to have happened on the *by-way*, and not on a public *highway*, which the town was liable to repair; and the case shows that the facts were applicable to that count alone. Under the other two counts the facts would constitute a variance.

Barber & Bushnell and *J. Pierpoint* for the plaintiff.

1. The charge of the court, as to the liability of the town, was correct.

The rights and duties of the town as applicable to this case, are defined by the 8th Section of the act of 1846.

The towns are liable for the sufficiency and maintenance of their roads, by the general law of the State. The railroad act has no provision exonerating them from this liability, or making the railroad company liable to the party injured, for any insufficiency of the highway, or the new way, which they may construct.

The fact that the railroad company undertake to build a new road, does not release the town from the liability to see that it is made such as the law requires for the safety of travelers. It is to be built to "*the acceptance of the selectmen*," and if not done to their acceptance, it is their business to see that it is done as the commissioners shall decide the "*just rights of the town and the public interest* shall *require*." Were it otherwise, and the town was only liable after the selectmen had accepted it, or the commissioners had made their order upon the company, without any action on the part of the selectmen to compel the company to make the road, the town might escape liability forever, by refusing to do anything.

It was the business of the town to have shut up the highway until they were prepared to take the responsibility of the travel over it. By suffering it to remain open and connecting with the new road, they invited the public to travel upon it, as an apparent

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public highway, for which the town was responsible. By so doing they adopted it as a highway of the town, so far as the public were concerned; therefore liable for all injuries which happen by reason of its insufficiency.

The primary liability of the town is not varied by the powers given to the railroad company, and if the highway is obstructed, it is the business of the town either to remove the obstructions, or see that a suitable and sufficient substitute for the highway is provided by the railroad company or by themselves, and any neglect on their part to do this, which results in an injury to a traveler without his fault, the town are responsible for, as for the insufficiency of the highway. *Willard* v. *Newbury*, 22 Vt. R. 458, *Currier* v. *Lowell*, 16 Pick. R. 170.

The railroad company are responsible to the town for all the loss and damage occasioned by their neglect to make the new road as provided by law. *Lowell* v. *Lowell & Boston Railroad Co.*, 23 Pick. 24.

2. The motion in arrest was properly overruled. The sufficiency of the declaration is to be determined by inspection of the declaration by the court. We claim that a legal ground of recovery is set forth in each count of this declaration; if so, it is no matter whether the proof applied to one or all. It is the ordinary case of a declaration framed to meet different states of fact.

If any count in the declaration is good, the court will presume that the finding of the jury was on that count, unless it appears that their finding was on the defective count. *Camp* v. *Barker*, 21 Vt. R. 469.

The opinion of the court was delivered by

REDFIELD, J. We have examined this case with some care, and have not been able to discover any good ground to distinguish it from that of *Willard* v. *Newbury*, in its principle. The facts are indeed somewhat different. But it seems to us the facts in that case were far more favorable to the town than in the present case. That portion of the road, in that case, where the injury occurred, was, for the time, altogether discontinued, and fenced up by the railroad, with the concurrence of the town authorities. And there was no possible mode in which this fence could have been kept up, except by the town trusting to the servants of the

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railroad to put it up, as they from time to time took it down to draw stone upon it to carry on their work, which they had the legal right to do; or else, by keeping an agent for this exclusive object constantly in the employ of the town. And still, notwithstanding this barrier was left down for that night only, by the mere neglect of the agents of the railroad, the town were held liable to the traveler who was injured through that neglect; thus making the town *primarily* responsible for the neglect of the servants of the railroad. In effect, saying to the town, the public have a right to look to you for a safe road, and if you trust to the servants of the railroad to keep up such barriers as it is your duty to keep up, their neglect, as between you and the traveler, is your neglect.

And further, it was held by this court, at the last term in Orange county, in the suit, *Newbury* v. *The Railroad Co.*, that the company was liable for the amount paid by the town for the neglect of the agents and servants of the railroad, and such costs as accrued in consequence of litigating the question, upon this ground, as this portion of the expense was incurred virtually for the benefit of the railroad company.

We think, then, it must now be regarded as settled law, in this State, that the primary obligation rests upon the towns, where railroads obstruct their highways, "to see that the public have a proper by-way to pass around the obstruction, and that proper obstructions were placed and kept up, to divert the travel from such highway or by-way, so long as they remain in an unfit state for the public use, so far as this could be done by common care and diligence," and that it is not competent for the town to fold their hands and shift this responsibility upon others, whether natural or artificial persons.

This is almost in the very terms of the charge of the county court, in the case of *Willard* v. *Newbury*, 22 Vt. R. 460, 461, and the supreme court say in that case, 465 p., that the question of "care and diligence" on the part of the town, "was properly submitted to the jury and *under suitable instructions from the court below;*" thus endorsing the charge to the fullest extent. And the rule laid down in that case, as applied to this case could leave no doubt of the correctness of the charge in the court below.

How far this rule is consistent with the decided cases in other

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States, it is needless now to enquire. We entertain no doubt upon that subject, and if we did, we should not feel at liberty to disregard the solemn determinations of this court, upon the very point, in so recent a case, upon such mature consideration, and so elaborately discussed at the bar, and so satisfactorily reported, and where we entertain no doubt of the satisfactory character of the general principles of reason and policy upon which it is founded.

Whether the town is held liable upon the adoption of the by-way as a part of the highway by acquiescence, (which is the truth of the case, no doubt,) or for not making a suitable by-way and putting up suitable guards to notify the traveler of his danger, until that was done, is important only as to the form of declaring. And the third count in this declaration may be regarded as setting out the very facts in the case, and referring it to the court to put the legal construction upon them, which might in some cases be regarded as insufficient, upon special demurrer, but always sufficient upon motion in arrest of judgment after verdict.

It seems to us that all the counts in the declaration may be regarded as sufficient after verdict, and the third count is certainly proved. And if it were necessary we might say the same of the other counts, but that is more questionable.

It is doubtful whether such a by-way can be regarded as a portion of the *highway*, even if made by the town. It is an open public way for the time being, and as such required to be kept in a certain state of repair, but how far it is to be regarded as one of the public highways of the town, must depend upon circumstances and time, no doubt.

But the consideration that this was made by the railroad company, or that the railroad company were bound to have made it more safe before obstructing the former highway, is nothing with which the traveler has any concern. He is not bound to inquire who makes the by-ways, or by what authority obstructions are put upon the highway. But towns, after having reasonable notice of the existence of obstructions in their highways, are bound to remove them or make safe by-ways to pass round them, or see to it that they are properly made by others, in order to exonerate themselves from liability to those who have occasion to travel. There is in law no necessary privity between the traveler and any one but the towns, as to the sufficiency of the highways.

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Batty v. Duxbury.

The towns must look to those who obstruct their highways, and take measures to obtain redress for such injuries.

This judgment must be affirmed.

NOTE BY REDFIELD, J. The following is an abstract of the cases cited in the argument by defendants' counsel, but it seems to the court, they have but a remote bearing upon the question before us. And we should scarcely feel justified in taking time to discuss them in detail. *Roxbury* v. *Worcester Turnpike Co.*, 2 Pick. 40, is a case of assumpsit to recover for repairing a portion of the highway over which the turnpike company had laid their road. The court held it a mere voluntary courtesy and denied the remedy.

Commonwealth v. *same*, 3 Pick. 327, is an indictment to compel the turnpike company to repair this portion of the road, and the court held them liable.

State v. *Hampton*, 2 New H. R. 22. This was a prosecution against the town for not keeping an old highway in repair, over which the State had given leave to a corporation to build a causeway. Held, a discontinuance of the town highway, and the town no longer liable to repair.

People v. *Denslow*, 1 Cain's R. 179. This is where a turnpike company laid their road across or along over an old highway, and erected a gate upon the old highway. The defendant was the gate-keeper. They had express permission in their charter to erect a gate near a certain house, and this gate was near that house, and held a fair exercise of the power and act which the legislature could confer.

Farmers' T. Co. v. *Coventry*, 10 Johns. R. 389. Toll-gates may be erected upon an old highway which is taken for the turnpike company, if so laid within the charter.

Is there any such privity between the plaintiff and the railroad company, as to entitle him to sue for special damages, without some special statute? or is the privity between the towns and the railroad company? or is the railroad company liable both to the towns and individuals?

Tinker v. *Russell*, 14 Pick. R. 279. The canal company had taken the entire road and completely obstructed the highway, and so it remained some years, till a road seven or eight feet wide was made by the neighbors, and the highway surveyor of that district. Plaintiff was injured, and sued the town. The court held the road discontinued by the grant to the canal company and their act under it. This case is *per cura* and so briefly reported as to afford but slight grounds.

Com. v. *Westborough*, 3 Mass. R. 406. *Certiorari* for discontinuing road by laying a new one, when there is nothing in the petition for discontinuance. Held, laying a new road which renders the old unnecessary, is a discontinuance of the old.

Lowell v. *Town of Moscow*, Maine R. 3 Fairfield 300. The injury happened on a temporary road to get round an obstruction in the old highway. If the town were obliged to keep the point of road open as a highway, the new road was laid out as a substitute for the old highway, and the time had not expired for opening the new road, and the town were still bound to keep the old road in repair for the purposes of public travel. This is very much like *Young* v. *Wheelock* in our Reports, and since others. The liability of the town had not altered.

Was the traveler bound to make inquiries in regard to the road being a public highway, before going upon the same, there being no other possible mode of getting on? or after the injury, is he to be turned over to the railroad corporation, or their

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servants? Might not a similar rule with equal propriety be extended to the case of a mere tort, by which the road is rendered dangerous?

Commonwealth v. *Charlestown*, 1 Pick, R. 180. Inhabitants not bound to repair a newly erected bridge over an arm of the sea, an obstruction to the navigation, and so a nuisance.

It is said the road should have been either formally opened, or in some way adopted by the town. But suppose they never do this, and the public officers never take steps to compel such adoption; then of course the traveler is to be turned over to the railroad corporation for redress and security, and as to this portion of the road the result is that the railroad corporation are alone liable for the first building of the road, and no one is bound to keep it in repair. The town and the railroad corporation may never agree as to the by-road. Shall it follow that no one is liable for repair?

Baxter v. *Winooski T. Co.*, 22 Vt. R. 114. No action will lie, for not building sufficient roads for the public to use, but resort must be had to indictment. But that is not this case.

Jeremiah C. Pierce v. Stillman Brown.

Mortgagor and Mortgagee. Trespass.

The estate and right of possession are given to the mortgagee by our statute, after condition broken, and he may after condition broken, sustain his action of ejectment, against the mortgagor or his grantees, without notice to quit.

Upon the death of a mortgagee before foreclosure, his right and interest in the mortgaged premises vest in his executor or administrator, to be administered as assets belonging to the estate.

It is immaterial when an acknowledgment of an instrument is made, if done when offered, it may be read in evidence.

Where A. was tenant under the mortgagor, and afterwards purchased the mortgage, (after condition broken,) and at the same time notified the mortgagor that he held the premises under the mortgage, it was held, that this was a repudiation of the tenancy, and a dissolution of that relation, and that his possession thereafter was adverse, and that there was no necessity of surrendering the possession to the mortgagor, and then bringing his action of ejectment, for A. had such title and possession, as would enable him to sustain an action for trespass committed while holding such adverse possession.

Where the premises are described by references to the *lines* and *lands* of adjacent proprietors, and the calls of the deed can be answered, and the land in dispute be included or excluded, and the quantity of land which the parties intended to mortgage was a lot containing about forty acres, as expressed in the deed, and

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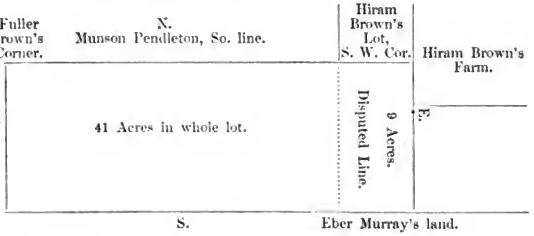
this statement is verified only by including the land in dispute in the mortgage, this circumstance in the absence of all possible motive not to include it with the remainder of the lot, the whole lot will be considered as covered by the mortgage, when such construction answers all the calls of the deed, and manifestly carries into effect the intention of the parties.

TRESPASS *quare clausum fregit.* The declaration described the land as follows: "In a plea of trespass, for that the defendant on "the second day of April, A. D. 1849, at Whiting in the county "of Addison aforesaid, and on divers other days and times between "that day and the commencement of this suit, with force and arms, "broke and entered the plaintiff's close situated in Whiting afore-"said, and bounded on the south by land owned by widow Murray "and James Chatterton,—on the west by land owned by Justus "F. Brown,—East by lands owned by Platt Ketcham and by Hi-"ram Brown, and north by lands owned by Hiram Brown and "lands of Ezra L. Needham and others, &c." Plea the general issue, and trial by jury. The following plan was proved on the trial and made part of the case.



The plaintiff, on trial, gave evidence tending to prove his possession of the premises described in his declaration and the commission of the trespasses as therein alledged. It was also proved that the title to said premises had been in one Ira Brown for some thirty years, and that he conveyed the same to the defendant, by deed dated the 16th of October, A. D. 1848. It further appeared in evidence, that the plaintiff went into possession of the premises and the entire tract of land described in the mortgage, hereinafter mentioned, from the said Ira Brown to Appollos Austin, under some kind of a lease or agreement with said Ira Brown in the spring of 1847, and continued such occupation until July or August, A. D. 1848.

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The plaintiff offered in evidence the said mortgage deed from Ira Brown to Appollos Austin, deceased, dated the second day of May, A. D. 1842, which described the land as follows, "a certain "piece or lot of land in Whiting, beginning in the north-east corner "of Fuller Brown's land, thence east, on M. Pendleton's south line, "to Hiram Brown's land, thence south, to the north line of a lot "formerly owned by Eber Murray, thence west, on the north line "of said Murray's land to, &c., containing about forty acres of "land." The plaintiff also offered in evidence, the assignment of said mortgage, dated the 17th day of April, 1848, and recorded the 22d day of May, 1848. The assignment was executed by G. A. Austin, executor of A. Austin; the acknowledgment of the said assignment was dated the 21st day of May, 1851, and recorded the 5th day of June, 1851. The assignment and certificate of the town clerk, were all upon the back of the said mortgage. The plaintiff also offered the note described in said mortgage, for the sum of $873,00 payable in three years from date, and interest annually, and the indorsements thereon. It was admitted that Gustavus A. Austin was the executor of the will of Appollos Austin, deceased, and that his signature upon the back of the note and to the assignment, was genuine.

The plaintiff introduced evidence tending to prove, that in July 1848, he and Ira Brown were on the mortgaged premises, some distance west of the premises conveyed by said Ira Brown to the defendant, and they had some disagreement relating to the repair of a house which was near by, and that the plaintiff then informed Ira Brown that he had bought the Austin mortgage, (showing him the mortgage and assignment,) and then said to said Ira, "I hold these premises under the mortgage," meaning said mortgage to Austin. There was also evidence tending to prove that the horse and cow of said Ira Brown were pastured a portion of the summer of 1848, on the premises, and that in the winter of 1847 and 1848, said Ira Brown had cut some wood on the premises, and until the fall of 1848, had the possession of a part of the premises, though not of the *locus in quo*.

The acts complained of were committed on that portion of the premises designated on the plan as lying east of the dotted line drawn from the south west corner of Hiram Brown's land, south to the Murray land.

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The defendant insisted, and requested the court to charge the jury that the plaintiff had not shown such a title under said mortgage deed, as to entitle him to maintain this action. And also objected to the evidence on that point, because among other things, the assignment was not acknowledged before this suit was brought, and because it did not appear when the note was indorsed, nor what was the will of Appollos Austin, nor whether the executor had any authority to convey, and because the evidence did not show any repudiation of plaintiff's tenancy, or taking possession under the mortgage, as was requisite to maintain this action.

The defendant also requested the court to instruct the jury, that if they found that the parties had treated the *locus in quo*, lying east of the line aforesaid as not covered by the mortgage, or if that point was a matter in dispute between them, that a mere declaration that plaintiff held the premises under the mortgage, would not be such a change of the prior relation of landlord and tenant, as to give the plaintiff the right of action; but in that case he was bound to indicate distinctly to the landlord that he claimed also, the disputed territory under it. There was no testimony tending to prove that any of the parties to this suit, or to the mortgage, had, previous to the fall of 1848, treated the *locus in quo* lying east of the line aforesaid, as not covered by the mortgage, or that that point was a matter in dispute between them.

The defendant also insisted, and requested the court to charge the jury, that the first line described in said mortgage deed extended no further east than the said south-west corner of Hiram Brown's land.

The court declined to charge as requested, any farther than is hereinafter stated, and admitted the mortgage, assignment, and note and indorsements thereon in evidence.

The court charged the jury that if the plaintiff, in the spring of 1848, purchased the mortgage and note, and took the assignment from the executors of Appollos Austin, and notified Ira Brown that he held the premises under the mortgage; that the plaintiff would after that time, have the possession of the mortgaged premises against Ira Brown or his assignee, and is entitled to recover for such trespasses alledged in his declaration, proved to have been committed.

And further, that the north line of the mortgaged premises does

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not necessarily terminate at Hiram Brown's south-west corner, but if the jury find that at the time of the execution of the mortgage deed in 1842, the premises claimed by the plaintiff, were then occupied and improved by Ira Brown as an entire farm, the disputed land in common with the rest, and not separated by any visible boundaries, and that the whole farm, including the nine acres of disputed land was bounded by the surrounding lands, as designated on the plan, and contained no more than about forty acres. The mortgage will cover the whole farm including the *locus in quo*. To which the defendant excepted.

J. Prout and *Kasson & Edmunds* for defendant.

1. The deed to Austin does not include the *locus in quo*. It is well settled that where there are well known obvious monuments, the mere addition of *quantity* will be wholly disregarded. *Gilman* v. *Smith*, 12 Vt. 150.

It is of no importance whether the farm was occupied as an *entire* farm. That hypothesis rests on a further presumption, that a man cannot mortgage a *part only* of his farm. As the plan was proved and admitted, it was a mere question of law where the boundaries were, and should not have been left to the jury.

2. The plaintiff had no title under the Austin mortgage, he could not maintain ejectment under it, and hence, could not have the *legal* right of possession. A mere equitable ownership of the mortgage will not justify the entry. Arch. Pl. 505. *Wild* v. *Cantillon*, 1 Johns. C. 123. *Jackson* v. *Myers*, 3 Johns. 388. *Jackson* v. *Pierce*, 2 Johns. 221. *Jackson* v. *Chase*, 2 Johns. 84. *Ives* v. *Ives*, 13 Johns. 235. *Suffern* v. *Townsend*, 9 Johns. 35. *Cooper* v. *Stower*, 9 Johns. 331.

1. The assignment to the plaintiff was not acknowledged, and his only interest was a chose in action.

2. The executor had no authority under the will, to convey the estate after condition broken.

3. The assignment does not purport to convey the title of the *testator*, but only the executor's *own interest*, and it does not appear he had any; the appendage to his name, of "executor of A. Austin," is but *descriptio persona*. *Higley* v. *Smith*, 1 D. Chip. 409.

The defendant could have maintained ejectment against the plaintiff, at the time when, &c., and it is absurd to say that he is

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liable to trespass. *Green* v. *Clark*, 3 Johns. 424. *Jackson* v. *Myers*, 3 Johns. 388.

3. There was no such repudiation of the plaintiff's tenancy, as to entitle him to maintain this action. The tenant must declare to his landlord distinctly, not only that he claims as mortgagee, but also, that he is no longer tenant; and also declare in *what right* he does claim. The mere declaration, that "he holds the premises under the mortgage," is insufficient to defeat the relation, especially when he at the same time shows his assignment which *is void*. This was only notice that he claimed under a void title, and was no notice. The repudiation should be distinct and unequivocal. *Greeno* v. *Munson*, 9 Vt. 37. *Hall* v. *Dewey*, 10 Vt. 593. *Hooper* v. *Willson*, 12 Vt. 695.

4. If the title of Austin did not vest in Pierce, then Pierce, even though he might claim under Austin, so as to justify a trespass by himself, yet it would be as Austin's *servant*. He could not maintain an action as such.

E. N. Briggs and *Barber & Bushnell* for plaintiff.

1. The trespasses complained of were committed in May, 1849. In July, 1848, plaintiff was in possession, and had been previously under some kind of an agreement. Ira Brown the mortgagor, was shown the mortgage and assignment, and notified by plaintiff that he held possession under the Austin mortgage, by an assignment of the same. If plaintiff was in possession as tenant of the mortgagor, here was a sufficient repudiation of the tenancy, and an adverse claim under the mortgage. *Administrator of North* v. *Barnum et al.*, 10 Vt. 220. The jury under the charge of the court, have found that plaintiff took possession under the mortgage.

2. A tenant may protect his possession by purchasing in a mortgage, and hold under the mortgage, after condition broken, without the assent of the mortgagor. *Newel et al.* v. *Wright*, 3 Mass. 156.

3. The defendant, as grantee of Ira Brown, could have no farther title or right than Ira Brown had, the conveyance was 16th October, 1848, some time after plaintiff had possession under the mortgage, and after condition broken.

4. By our statute the mortgagor is entitled to possession until condition broken. After condition broken, the mortgagee is entitled to possession, and can take possession without any process. *Wilson* v. *Hooker et al.*, 13 Vt. 653.

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The assignment of the mortgage transfers the mortgage debt, or is evidence that the debt was transferred at the same time. *Pitkin* v. *Leavitt*, 13 Vt. 379. 2 Swift's Dig. 170. *King* v. *Harrington*, 2 Aiken 33. *Stewart* v. *Thompson*, 3 Vt. 255.

A debt secured by mortgage, with the mortgaged premises shall be considered personal assets of deceased persons. Comp. Stat. of 1850, p. 344. Sec. 29 and 30.

The question is virtually decided in Massachusetts under a similar statute. *Cutter* v. *Davenport*, 1 Pick. 86.

As to the question whether the *locus in quo* was conveyed by the description in the mortgage, the court in their charge to the jury, followed the instruction of the Supreme Court in this case as given at the last term.

The opinion of the court was delivered by

ISHAM, J. In this action of trespass on the freehold, the plaintiff seeks to recover damages for trespasses committed during the season of 1849. For the purpose of showing his title to the premises in question, the plaintiff, on the trial, offered in evidence a mortgage deed executed by Ira Brown to Appollos Austin, dated May 2, 1842, with an assignment of the mortgage and transfer of the note to him, made by G. A. Austin as executor of Appollos Austin on the 17th day of April, 1848. The assignment was recorded May 22, 1848, but not acknowledged until May 21, 1851.

At common law, as between the mortgagor and mortgagee the legal estate as well as the right of possession, is in the mortgagee, whether before or after condition broken. And under the provisions of our statute, p. 286, Sec. 12, it has uniformly been considered that the estate and right of possession are given to the mortgagee, after condition broken, and that he may then sustain his action of ejectment against the mortgagor or his grantees even without notice to quit. *Atkinson* v. *Burt*, 1 Aik. Rep. 329. *Lyman* v. *Mower et al.*, 6 Vt. 345. So that the legal interest and right of possession to these premises were in the estate of Appollos Austin at the time of the assignment of this mortgage to the plaintiff. *Wilson* v. *Hooper*, 13 Vt. R. 653. And it is equally true, that on the death of a mortgagee before foreclosure, his right and interest in the mortgaged premises vest in his executor and administrator, to be administered as assets belonging to the estate.

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But it is insisted that the plaintiff has no right to these premises, and that the assignment of this mortgage, for various reasons, is ineffectual to convey to him that right of property or possession that will enable him to sustain this action. It is to be observed that this is purely a question between the estate of Appollos Austin and the plaintiff as assignee, and that whatever would be sufficient to estop the executor from claiming the title and possession as against his assignee, will be sufficient as against the mortgagor, and all claiming under him.

The Comp. Stat. p. 384, Sec. 7, provides that no conveyance shall be good and effectual in law against any other person but the grantor and his heirs only, unless the instrument be acknowledged and recorded; as against the *grantor* and *his heirs* the instrument is effectual to convey the legal title, though neither acknowledged or recorded. The assignment in this case as between the parties to the instrument, contains all the necessary requisites of an operative conveyance. It has the usual operative words, was signed, sealed and witnessed, and will estop the executor and the estate from claiming the premises assigned as against the assignee.

It should be acknowledged, as a preliminary step before recording, and as that supersedes the necessity of proving its execution, when produced in court, it is immaterial when it is made, if done when it is offered in evidence. 13 Vt. R. 379, *Pitkin* v. *Leavitt*. The same principle applies to the recording of a deed, or other conveyance. For when such an instrument is recorded at any time after its date, it becomes effectual from its date; *Douglass* v. *Spooner*, N. Chip. 74, and it may be read in evidence, if recorded at any time before trial. 6 Vt. R. 532, *Harrington* v. *Gage*. The assignment, therefore, was properly read in evidence, so far as objections were taken to its acknowledgment. Equally unavailable is the objection, that the executor had no authority to make this assignment without license from the probate court. This objection proceeds upon the ground, that after condition broken, the property becomes real assets, and to be administered as real estate of which the testator died seized. But the Comp. Stat. p. 344, Sec. 29, provides that the debt and mortgaged premises belonging to a deceased person as mortgagee, when not foreclosed in his life time, shall be considered as personal estate in the hands of the executor, and is to be administered and accounted for as such. Un-

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der this statute the debt and premises mortgaged are as much under the control and disposition of the executor as any article of personal estate that comes into his possession. He may discharge, release and transfer the same under the powers derived from his letter of administration.

The objection also, that this assignment purports to convey on the part of the assignor "*all his right, title and interest*" to the premises, and not *his right, title and interest as executor*, must be considered as falling within the principle, and overruled by the case of *Stewart* v. *Thompson*, 3 Vt. R. 255. It was there held in the assignment of a mortgage, that the intention of the parties as manifested by the whole instrument, is to govern in its construction. This assignment *in its premises describes the assignor as executor* of Appollos Austin and in *that capacity* the instrument is signed and sealed. When the instrument is signed in his capacity as executor, it is an assignment of his right, title and interest which he has in that capacity, as much so, as if it was so written in the body of the assignment, and equally manifests such to be his intention. And when *these instruments* are to be carried into effect, according to the evident intention of the parties, we cannot hesitate to say, that this assignment is sufficient to transfer to this plaintiff all the interest and right which was vested in the estate of Appollos Austin, and for that purpose, was sufficient to permit it to be read in evidence as against the defendant.

It is further claimed, that this action cannot be sustained, as the plaintiff was not in possession of the premises under the mortgage at the time of the trespasses complained of, but on the contrary, was in possession as tenant, of Ira Brown the mortgagor. We learn from the case, that the plaintiff went into possession of the premises described in the mortgage deed in the spring of 1847, under some arrangement with Brown, and that he continued in such possession until July or August, 1848. At this time the plaintiff informed Ira Brown that he had bought the Austin mortgage, and distinctly informed him that he held the premises under the mortgage, and at the same time showing him the mortgage deed and assignment.

It is unquestionably true that a tenant cannot deny the title of his landlord, nor set up an outstanding or paramount title in himself or a third person. 2 Smith's Lead. Cas. 570. At common

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law this rule did not exist, except in cases where the lease was by deed indented, where the estoppel arose by indenture, and not from the tenancy. Lit. § 58 Co. Litt. 47–6. But since the time of Lord Holt, the rule has been established which precludes the tenant, in all cases where that relation exists, from denying the landlord's title. Yet the estoppel is equitable and not legal. 2 Smith's Lead. Cas. 569, 570.

But whatever may be its character "it only debars him from "contesting the validity of the title *at the time* when the *lease was* "*made* and *possession given*, and not from showing that the right "which the landlord then had was defeasible or limited in its na- "ture and has since expired or been defeated." This rule is given by Lord Denman in *Doe* v. *Barton*, 11 Adol. & Ellis 307. *Knight* v. *Smythe*, 4 M. & Lel. 347. 2 Smith's Lead. Cas. 570. *Jackson* v. *Rowland*, 6 Wend. 666. And this principle has been applied to cases very similar to this in facts. 15 Pick. Rep. 147, *Smith* v. *Shepherd*. 1 Met. Rep. 494, *Welch* v. *Adams*. 9 Bing. Rep. 613, *Hapcraft* v. *Keyes*. 3 Mass. Rep. 156, *Newel* v. *Wright*.

In this State it has been held, "that a tenant may repudiate his "tenancy and set up an adverse claim in his own right, if this is "made known to the landlord," *North* v. *Barnum*, 10 Vt. R. 223, "and when the tenant notifies his landlord that he shall no longer "hold under him, the relation ceases. The possession has become "adverse, and the statute of limitations begins to run." 9 Vt. R. 37, *Greeno* v. *Munson*. And under the decisions in England and in this State, we have no doubt that if the plaintiff first entered into possession of these premises under the mortgagor, as his tenant, still he might repudiate that tenancy by purchasing the Austin mortgage as being an older and better title, and protect himself in his possession of the premises, from any claims of his former landlord. And whenever by purchasing such title he is entitled to the right of possession, it would be an idle ceremony to require the tenant to surrender up his possession, and then resort to his action of ejectment, when its only effect can be, to put the plaintiff in the same situation he now occupies. We apprehend this is not required by the law, and Lord DENMAN, C. J., in *Doe* v. *Barton*, observes, "that it seems absurd to require him to go "through the form of an ejectment in order to put them into the

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"very position in which they now stand." When, therefore, the plaintiff exhibited to Ira Brown, in the summer of 1848, the mortgage deed and the assignment of the same to him and informed him of his ownership, and notified him that he held the premises under that mortgage, it was a repudiation of the tenancy and a dissolution of that relation, and his possession thereafter was adverse. Chitty on Cont. 341. 1 Moo. & Pag. 480. And there was no necessity of surrendering the possession to the mortgagor, and then bringing his action of ejectment, for it could only place him in the same situation in which he then was. The court therefore very properly charged the jury, that upon those facts the plaintiff had such title and possession as would enable him to sustain this action.

The premises on which these trespasses were committed were conveyed by Ira Brown to the defendant on the 16th of October, 1848, and are situated east of the dotted line on the plan which is made part of the case.

The important question arising in this case is, whether in point of fact, the mortgage deed given to Austin and assigned to the plaintiff, includes the tract of land on which the trespasses were committed, and which was conveyed to the defendant. This is a question of law and depends upon the construction which should be given to the deed. The premises are described by references to the *lines* and *lands* of adjacent proprietors. No other monuments are referred to, and courses and distances are not otherwise given. And if we were to be governed entirely by the land of adjacent owners, the calls of the deed can be answered, and the land be included or excluded, on an equally reasonable construction of the deed. For if the first or north line in the description commencing in the north-east corner of Fuller Brown's land, thence running east on Pendleton's south line to Hiram Brown's land, terminates at the south-west corner of Brown's land at the dotted line, the premises would not be included in the mortgage. But if the line is continued past that corner until it strikes Brown's land lying east of this lot, then the premises are included in the deed. The quantity of land which the parties intended to mortgage was a lot containing about forty acres, as expressed in the deed, and this statement is verified only by including the land in the mortgage. This circumstance with the absence of all pos-

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sible motive not to include it with the remainder of the lot, has induced us to consider it as covered by the mortgage, as this construction answers all the calls of the deed, and manifestly carries into effect the intention of the parties. The premises therefore being included in the deed, and the plaintiff having this title and possession at the time of committing the trespasses for which the action is brought, we see no reason for disturbing the verdict in the case.

The judgment must be affirmed.

In the Matter of the Town of Bridport.

Highways. Commissioners—their powers and duties.

The 28th Section of Chap. 22 of the Compiled Statutes of 1850, provides, "That "when the public good, or the necessity and convenience of the inhabitants re- "quire a highway to be laid out, *on the line between two towns*, any seven or more "free holders may make application to the selectmen for that purpose." And the 44th Section of the same Chapter provides, "That if the selectmen of such "towns shall neglect or refuse to lay out such highway, and in no other case, "any seven or more free holders may make application to the county court for "the appointment of commissioners for that purpose." Under the provisions of these two sections, it was held, that commissioners had conferred upon them the same powers, and the performance of the same duties, and none other, that were given to the selectmen under such petition, when pending before them.

And where the road petitioned for is wholly in one town, and upon the refusal or neglect of the selectmen of said town to lay such road, commissioners are appointed by the county court, it was held, that the powers of the commissioners in such case, are co-extensive with those of the selectmen of the town, and that the commissioners can only act within the territorial limits of the town.

Where commissioners appointed under the provisions of sections 28 and 44 of chapter 22 of the Compiled Statutes of 1850, laid the road wholly in one town, and it appeared from their report that the road could, except for a short distance in one or two places, as well have been laid *on the line of both towns* as by the side of said line, it was held, that the commissioners exceeded their power and authority, and that the proceedings of the county court establishing a highway so laid, on petition, would be set aside.

This was Application or Petition to the supreme court, by the town of Bridport, for a writ of *certiorari*, to vacate the

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proceedings of the county court in accepting the report of commissioners in laying out a highway. The facts are sufficiently stated in the opinion delivered by the court.

Barber & Bushnell for petitioners.

J. Pierpoint for defendants.

The opinion of the court was delivered by

ISHAM, J. This is an application for the writ of *certiorari*, in which complaint is made of the decision of the county court in accepting the report of commissioners in laying out a highway.

The commissioners were appointed by the county court upon a petition of several free holders of the towns of Addison and Bridport, in which it is stated that application had been made to the selectmen of those towns, to lay out a public highway, on or near the line between the towns from Jesse Crane's in Bridport to Marshall Smith's in Addison, and that the selectmen had neglected and refused to grant the petition. From the report of the commissioners, we learn that a public highway was surveyed by them between the *termini* mentioned in the petition, but wholly laid in the town of Addison, the line between the towns being the south line of the road, and for a portion of the road the town of Bridport was made chargeable for its support. The county court accepted the report, and ordered the road to be worked and opened for public use.

The legality of the proceedings of the commissioners in that survey, and of the decree of the court in accepting that report and ordering the road to be opened, are matters brought before this court on this application. It is insisted by the town of Bridport, that the proceedings of the commissioners are irregular in laying the road wholly in the town of Addison, and that no facts are reported, or found to exist in the case, that warranted the acceptance of the report, or the order of the court for the opening of the road.

The 28th Section of the Compiled Statutes, p. 165, provides, "That when the public good, or the necessity and convenience of "the inhabitants require a highway to be laid out *on the line be-* "*tween two towns*, any seven or more free holders may make ap- "plication to the selectmen of such towns for that purpose."

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In the matter of the town of Bridport.

The 44th Section provides, "That if the selectmen of such "towns shall neglect or refuse to lay out such highway, and in no "other case, any seven or more free holders may make applica- "tion to the county court for the appointment of commissioners "for that purpose." Under these provisions the powers and duties of commissioners are apparent. The legislature obviously intended to confer upon them the same powers and the performance of the same duties, and none other, that were given to the selectmen under such petition when pending before them.

Their inquiries are to be directed to the necessity and convenience of the same road, and in its location they are confined by the same restrictions, and within the same limits, as that of the selectmen. In other words, the county court, by their commissioners, are required to do what should have been done by the selectmen.

On a petition for a road of this character, it is evident different proceedings are to be had from those required where the road is wholly laid in one town. In such case the power of locating the road is placed in the hands of the selectmen of the town where the road is proposed to be laid, or in commissioners which may be appointed, on their neglect and refusal to survey the same, and their powers in such case are co-extensive with those of the selectmen of the town, and can act only within its territorial limits. But on a petition for a road *on the line of two towns*, the selectmen of both towns are the only board to whom the application is first to be made, and they are required to proceed together, in appointing a time and place of hearing, giving notice to persons interested, and causing their orders and survey to be recorded in the town clerk's office of each town. And on their refusal, commissioners may be appointed for that specific purpose, whose powers and duties also, are the same and are derived from the same source with that of the selectmen of both the towns. On such a petition the Legislature evidently contemplated the case, where the road was to be located within the territorial jurisdiction of both towns, part of the road located in one town and part in the other, so that the line of town shall continuously divide the road. And that legislative policy, that gave to the selectmen of one town exclusive jurisdiction in laying roads wholly within its limits, gave to the selectmen of both towns, or commissioners appointed in their place, the same power

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and authority where the road is located within the territory of both. In each case the interests of all the towns, as well as their respective inhabitants, would be represented by the selectmen of each. These provisions of the act also give a construction to the expression in the statute, "*On the line between two towns.*" It does not mean *along and by the side of the town line*, but refers to a road divided by the line of the town, and over the limits of which the selectmen of no one town have authority to act, or lay the road. Previous to the act of 1845 on such petition, the road could be located in no other way, and from that line or course they were not at liberty to deviate for any matter or cause. If the position of the land was such, or any natural obstacle existed that rendered it impossible to lay the road so as to be divided in its whole length by the line of the towns, the consequence followed that no road could be laid, as no provision was made by statute authorizing such deviation. To provide a remedy in such case was the object of the act of 1845, being the 31st Section of the Compiled Statutes, p. 160. That Section provides "that "when a highway is required to be laid out so that it shall be "*near* the line between two adjoining towns, instead of being *on* "*the line* between such towns, on account of the position of the "land, or nature of the soil over which it may be laid, and when "both towns are benefitted in a similar manner as though such "highway were on such line," then such highway may be laid by the selectmen of both towns, and on their neglect or refusal, by commissioners of the county court.

This act also gives a legislative construction to previous legislation on this subject similar to that we have expressed, and has not altered the law previously existing, except in one instance, in which such deviations are allowed and the road permitted to be laid *near the line*, where the position of the land and nature of the soil renders it difficult or impossible *to lay the road on the line.* Where such difficulties do not exist the road must be laid *on the line* the same as before the act. Where they do exist they may so deviate as to lay the road near the line, so far as is necessary to avoid the difficulties, and when avoided it becomes their duty to continue the road on the line of the towns as before. To justify such deviations two facts must be affirmatively found to exist; first, that the position of the land or nature of the soil is such that

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the public good or convenience of the inhabitants require such deviations, and secondly, that both towns are benefitted in a similar manner as though such highway were on such line.

Such facts being found affirmatively, will, under the act of 1845, justify such deviations to that extent, whether the road is laid by the selectmen of both towns, or by commissioners appointed for that purpose on their neglect and refusal.

On this petition, therefore, if the commissioners found that the public good required the road to be laid, it should have been located in both towns, so that the line of the towns should have divided the road between them. And from this course they were not at liberty to deviate unless the position of the land and nature of the soil required it.

This fact, the commissioners have not found to exist, and the matter is not even left for presumption, for they have found, and at the request of the town of Bridport have reported, that no such difficulties or obstacles existed, and that the road could, except for a short distance in one or two places, as well have been laid *on the line of both towns*, as by the side of it, and wholly within the town of Addison. There is nothing in the case, therefore, that authorized the commissioners to lay the road in Addison and charge the town of Bridport with the maintenance of a portion of it. But the road as laid is one which could have been located by the selectmen of Addison alone, and over which they alone have jurisdiction.

The result is, that there is error, and that this writ must issue, and that the proceedings of the county court in establishing that highway be set aside.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF RUTLAND,

FEBRUARY TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

TOWN OF RUTLAND *v.* ABEL PAIGE, WILLIAM BARNES, AARON BARNES AND REUBEN R. THRALL.

[IN CHANCERY.]

Cross Bill. Officers' liability. Liability of cosureties on a Constable's Bond.

If the signers of a constable's bond, at the time of signing, neglect to affix their seals to the same, and admit that it was their intention to have affixed their seals to the bond at the time of signing, the court of chancery will decree that the bond shall be treated as if sealed.

A cross bill can be sustained only on matters growing out of the original bill. *Slason* v. *Wright*, 14 Vt. 208.

If A., B. and C., as cosureties, execute an official bond with D., as constable of a town, neither of the cosureties can sustain an action against the town for any default of duty on the part of D. as constable, to himself; nor can one of the

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cosureties sustain a bill in chancery against the other two cosureties, for contribution for such default of D.

There is no privity whatever between the creditor and the sureties upon a constable's bond.

An officer is not bound to regard the equities subsisting among the debtors, in an execution, nor can he be subjected to a suit in favor of a co-obligor or surety, for any default in enforcing an execution against the principal debtor.

APPEAL from the court of chancery. The court of chancery dismissed the cross bill, from which decree Thrall, the orator in the cross bill, appealed, he being one of the defendants in the original bill.

The defendants to the cross bill took the testimony of Abel Paige, one of the defendants to the original bill, which was brought to compel the defendants to treat the bond as if their seals had been affixed at the time of signing, which by mistake they neglected to do. The testimony of the said Paige, the orator, in the cross bill, moved the court to suppress, on the ground that said Paige is directly interested.

The facts are sufficiently stated in the opinion of the court.

Reuben R. Thrall per se.

Silas H. Hodges for defendants.

The opinion of the court was delivered by

REDFIELD, J. The object of this bill is to require the defendants, who executed an official bond for the first defendant, as constable of the town of Rutland, except sealing, to treat the bond as sealed at the time of signing. The defendants in their answers all admit, that it was their intention to have sealed the bond at the time of signing. This will entitle the orators to the decree they ask unless some defense is made out, by way of the cross bill.

The cross bill is brought by Thrall, one of the sureties, upon the ground that he having claims against the town, which if seals are regarded as affixed to the bond, he would be estopped from prosecuting against the town, and by consequence from compelling contribution from the other sureties, that contribution should be decreed, as the condition of perfecting the bond.

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The case went through all the stages of answer, traverse and testimony, in the court of chancery. And without taking time to state the character of Mr. Thrall's claim for the default of Paige, as constable, which is at the most a payment made, as surety for Hooker's,* by reason of Paige's failure to collect the execution, as against the principals, we pass at once to the claim for contribution, as against the Barnes, the cosureties upon the bond.

This does not seem to be a claim in which the plaintiffs have any concern whatever. It is no offset, defense or qualification to the claim set up in this bill; nor does it seem to us that it is any equity, as between the cosureties of Paige, which it is essential to have objected, before or as a condition of perfecting the bond. We are therefore altogether at a loss to see why this is any more the proper ground of bringing a cross bill against this plaintiff than any other independent equity subsisting among the cosureties.

For if this is any ground of equitable interference whatever, it is not dependent upon the mere accident, that the bond happened not to have the seals attached at the time it was signed. That was agreed to be done, at that time, and comes fairly within the rule, that, in equity, what is agreed to be done must be regarded as done. And if so, it must be without annexing new conditions not stipulated at the time, at least so far as the plaintiffs are concerned.

We think, therefore, that the subject matter of this cross bill has no such connection with the principal suit, that the plaintiffs should be compelled to await its determination. And the same might properly have been dismissed upon demurrer or motion to that effect, without having gone into proof in the court of chancery. But no such motion being interposed, the case in discretion might no doubt with perfect propriety, have been retained, as it was, in the court below.

Mr. Justice STORY, Eq. Pl. § 389, defines cross bills, "A bill of this kind is usually brought, either to obtain a necessary discovery of facts, in aid of the defense of the original bill, or to obtain full relief to all parties, touching the matters of the original bill." Now this is neither. It is not an equity growing out of

* The case, *Bank of Rutland* v. *Thrall*, 6 Vt. 237, shows fully the ground or nature of the orator's claim against the town.

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the claim set up in the original bill, any more than a *general* decree of contribution among the cosureties would be, not only as to the claims of these defendants against the town for the default of the constable, but of all other creditors who should compel the town to pay and thus incidentally subject these defendants, and all through the perfecting of this bond. But no man will contend, that a *general* decree of contribution among these cosureties, is the proper basis of a cross bill, in this stage of the proceedings, it would be premature, until after a recovery against the town, and a recovery by the town against the signers of the bond, and an actual payment by the sureties. For until that event, there is no fixed cause of action in the cosurety. It is true that a surety may sometimes bring a bill against his principal, *quia timet*, to compel him to make payment, or submit his own property to levy upon execution, in order to save the sureties the necessity of raising the money, if the amount is such as to cause risk to them. Because it is the stipulation of the principal, that he will pay the whole debt and save the party absolutely *harmless*. But the cosurety only stipulates for contribution towards the payment of such sums as the other sureties shall be compelled to pay to the creditor. If this were such a case in principle, that would only be a ground for bringing an original bill, not a cross bill, which it is said, in 3 Daniels Ch. Practice 1742, is treated as a mere auxiliary suit, or as a dependency upon the original suit, and can be sustained only on matters growing out of the original bill.

Now this claim, set up in the cross bill, which looks a good deal beyond the contract of the parties, as it seems to us, is nothing "growing out of the original bill." It is nothing in which the plaintiffs have any concern, any way. The defendants agreed to give the plaintiffs a bond to save them harmless from any default of Paige, as constable. This they partly executed and admit they intended to execute with all legal formalities, but one of the defendants now says he has a claim against the town for the default of Paige, which accrued indeed since the bond *was* to have been perfected, and which claim the town have never recognized, and if he had sealed the bond, as he agreed at the time to do, the town could never have been compelled to pay, and still he persists in having this kind of *inchoate claim* adjusted, as a preliminary to performing his contract with the town, and which if he had per-

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formed, as he agreed to do, would forever have formed a perfect defense to his claim against them. This, it seems to us, is no proper subject for a cross bill. The same was held by this court in *Slason* v. *Wright*, 14 Vt. R. 208.

But as the case has been discussed upon the merits, it may be desirable that some intimation should be given how the case stands upon the bill, as an original bill. And we have been unable to see how the defendant Thrall can make out a case for contribution against his cosureties. We think they may stand upon the very terms of this contract, *i. e.* to save the *town harmless*, by reason of any default of Paige. This is done by way of estoppel, so far as defaults of Paige towards his sureties are concerned. But it is none the less a *performance* of this bond, and it is no fraud or surprise, upon any one, for it appears upon the face of the bond itself, as much as if it had contained an express stipulation that none of the sureties should ever sue the town for any default of Paige. So that although Paige is liable to Thrall on the bond for default of duty, the town are not liable over, *for such default*, and the sureties of course not bound to indemnify such defaults, to the creditor, as their contract is with the town. It is obvious then to us, that this is *casus omissus* in the contract, and not only so, but expressly excluded from the operation of the contract, and which the parties must have understood at the time, or were bound to know, as every man is bound to know the law. In order, then, to decree contribution for this default of Paige against Barnes, we must in the first place subject them to a contract which they never made, and secondly, we must judge them by a rule of law unknown to the books. They must be supposed to have stipulated to be liable to the town for default of the constable, for which the town could not be made liable, and then we must allow the creditor to go directly against the sureties, in the constable's bond to the town, when heretofore it has been conceded, that no privity whatever existed between the creditor and the sureties upon a constable's bond. We think it must be sufficiently obvious to all, that no such extraordinary prerogative of power could properly be exercised by a court of chancery.

There are, we think, other formidable difficulties in the way of the plaintiff's recovery against the town, aside from the estoppel. The default alledged in one of the declarations against Paige is,

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not accounting for the money received upon the execution against the principal, growing out of the sale of the property of the principal. Now this fact, if it existed, would have been a perfect defense for Thrall, when sued by the creditor, or if judgment had been rendered against him, at the same time with the principal, and the execution had been levied upon the property of the principal and sold, and the money realized, and the creditor then proposed to collect it again of the surety, a court of equity would grant a perpetual injunction.

In the other case the default alledged against Paige is not "collecting and returning the execution." This would no doubt give the creditor a cause of action against the officer. But, if instead of pursuing it, he saw fit to collect the debt of the surety, we do not understand that the surety could either pursue the officer for this default, in the name of the creditor or in his own name. He could not pursue it in the creditors name, because the payment of the debt by the surety, is the same as payment by the principal, and extinguishes all collateral remedies in the name of the creditor.

He could not pursue it in his own name, because there was no such privity between him and the officer as will render the officer liable to him. Officers are liable to the creditors and debtors alone, for whom and against whom they collect debts, or attempt to collect them. If they were liable to every one in the most remote degree affected by their acts, there would be no end to suits. All the creditors of the creditor, and of the debtor too, might sue separately.

It was decided by this court, in this county, within the last two years, that officers were not bound to regard the equities subsisting among the debtors, in an execution. If so, he ought not surely to be subjected to a suit, in favor of a co-obligor or surety, for any default in enforcing an execution against the principal debtor.

We entertain no doubt whatever that Paige must be regarded as an interested witness on the part of the defendants, his sureties, until he is released by the other defendant. He is in fact more in interest than any other defendant, the defense being confessedly for his benefit.

The cross bill was properly dismissed in this case, and the decree of the chancellor is affirmed.

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Rufus Goss v. Asa E. Whitney.

Promissory note made on Sunday. What constitutes a delivery.

A promissory note made on Sunday, but not delivered until some other day is valid.

What constitutes a delivery.

This was an action of

Assumpsit on a promissory note given to Franklin B. Goss, or bearer, and the plaintiff declared upon the note, as bearer.

It appeared on the trial, that one Benjamin N. Whitney was indebted to the said Franklin B. Goss, for some sheep, and that on the day before that, on which the note is dated, the said Goss and Whitney were together, and had some negotiation about said Whitney's indebtedness to Goss, but nothing was concluded; that on the day of the date of the note, which was upon the Sabbath day, the said Goss was at the house of Sylvester Segar, and Whitney came there, and some conversation was had about said indebtedness, and Whitney wanted Goss to take a horse for the debt, which Goss declined to take. Goss then asked Whitney if he would do as he had agreed, and Whitney replied that he would. Thereupon Goss asked for pen, ink and paper, and wrote the note given in evidence, and told said Whitney to get the note signed by the defendant, (who was not present, but about three miles from Segar's,) and leave it, on the same day, at the house of Towle, where he, Goss, could get the note, as he, the said Goss expected to go by Towle's house that evening. It further appeared, that said Whitney took the note and on the same day carried it to the defendant, and the defendant signed the note and delivered it to the said Benjamin N. Whitney, who carried the note on the same day to the said Towle, and delivered it to Towle, and directed Towle to deliver the note to Goss, provided Goss left with him a discharge of said Goss's claim against him, the said Whitney. It further appeared, that Goss called upon Towle the next Monday or Tuesday after the date of the note, and delivered Towle a discharge of his claim against Whitney, and took the note. It further appeared, that Towle afterwards delivered to Benjamin N. Whitney the discharge executed by Goss.

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Upon the foregoing facts, the county court decided that the plaintiff could not recover, and rendered judgment for the defendant; to which decision of the county court the plaintiff excepted.

Briggs & Conant for plaintiff.

Parker & Nicholson for defendant.

The opinion of the court was delivered by

REDFIELD, J. It is settled by the case, *Lovejoy* v. *Whipple*, 18 Vt. R. 379, that a promissory note written and signed on Sunday, will not on that account be void, if not delivered until some other day. It is therefore not necessary farther to discuss that question.

The only inquiry into the present case then, is whether this note was delivered upon Sunday. We cannot regard Benjamin N. Whitney as the agent of Franklin B. Goss, in procuring the defendant to sign the note, or in receiving it and carrying it to Towle. In all this he must be regarded as a principal, acting solely upon his own responsibility. The note was intrusted to him, by the defendant, to do with it precisely as he chose. It would not therefore, become a binding contract upon the defendant, until delivered by the principal, Benjamin N. Whitney. And his delivery of the note must be regarded precisely in the same light as if the note were signed by himself, either alone, or jointly with the defendant. He might deliver it absolutely to Towle, to take effect presently as a promissory note, and in that case, it would no doubt have been regarded as having been delivered to Franklin B. Goss upon Sunday. But he might also annex conditions to the delivery, and make Towle his agent to see that these conditions are complied with, and in that case, the delivery would not become complete, until these conditions were fully complied with. That was the case here. And the note was not to go into the control of Franklin B. Goss, until he delivered a discharge of his claim against Whitney. This was the only condition, and the sole consideration upon which the note was to take effect. Thus it will appear very obvious, that neither the consideration of the note, nor the title of the note passed, until Monday or Tuesday after the Sunday upon which the note was written and signed. This alone would con-

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stitute the delivery of the note as a binding contract. The note, therefore, could not be regarded as a contract fully executed upon Sunday, and is not therefore void, by reason of any provision of law upon that subject.

It will doubtless be borne in mind, that the restriction which Benjamin N. Whitney put upon the delivery of the note to Franklin B. Goss, was under the circumstances, a very important one. Ordinarily the delivery of a note, to be received in payment of a pre-existing debt, would operate *ipso facto* to discharge the debt; but in the present case, if delivered upon Sunday, it would not have that effect, so that the formal discharge of the debt, upon some other day, formed a very important consideration of the note, and shows very clearly that the note to effect the purpose of the parties, either as to the note, or the pre-existing debt, must be regarded as taking effect at the time the discharge of the debt was exchanged for the note, with Towle, according to the direction of Benjamin N. Whitney, Towle acting as the mutual agent of both parties.

Trustees of Troy Conference Academy v. Nehemiah Nelson.

Subscription-paper. Liability of subscribers. Consideration.

N. with other persons, signed a subscription-paper, thereby promising to pay to the *trustees* of Troy Conference Academy, or to their order, the sum of one hundred dollars, for the purpose of enabling them to pay the debts of said Academy; one-half by the first of June, 1844, the remaining half in one year thereafter, provided that the sum of twenty thousand dollars is subscribed by the first of January, 1844; the sum of twenty thousand dollars was subscribed by the first of January, 1844, and N. paid one half of his subscription and then gave notice that he should not pay the remaining half. In an action brought against N., after the expiration of the said year, to recover the remaining half of his subscription, it was held, that the obligation imposed upon and assumed by the trustees of the Academy to see to, and make the application of this money, as directed by the subscribers to this fund, so consummated the contract, that N. could not avoid payment on the ground that there was no consideration for the promise; and that whether the relation each subscriber bears to the other, or to the institution itself is considered, N. is estopped from denying the obligation of his contract.

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The amount of the consideration is unimportant, and it is not necessary in this State, that it should appear upon the face of the contract or agreement, as it may be proved by testimony *aliunde*.

ASSUMPSIT. The suit was commenced before a justice of the peace, and came to the county court upon appeal. Plea, general issue, and trial by the court, September term, 1851, of the county court,— PIERPOINT, J., presiding.

On trial, the plaintiffs gave in evidence a subscription paper, in these words: "We the subscribers agree to pay the sums hereunto "by us subscribed, to the trustees of the Troy Conference Acade- "my or their order, for the purpose of enabling them to pay the "debts of said Academy, as follows, viz: one-half by the first of "June, 1844, and the remaining half in one year thereafter, pro- "vided that the sum of twenty thousand dollars is subscribed by "the first of January, 1844, and we agree to give our notes to the "said trustees for the amount of our subscriptions, payable as "above, on interest from the time when the subscription is filled. "Interest to be due annually."

"West Poultney, June 9th, 1843."

The plaintiffs also introduced evidence, showing a compliance on their part, with the terms and conditions expressed in said paper, and that more than twenty thousand dollars was thereto subscribed prior to the first day of January, 1844. The defendant subscribed said paper for one hundred dollars, and in the summer of the year 1844, paid to the plaintiff one-half the amount thereof, but at that time denied his liability, and said he would not pay any more, and after the expiration of one year from the time, when said subscriptions were filled up, refused, on request made to him for the purpose by the plaintiffs, to pay the balance of his said subscription, or to give his note therefor. It was also shown, that the plaintiffs were deeply involved in debt, which rendered said subscription necessary to enable them to make payment, and that they incurred large expenses, and made disbursements in obtaining said subscriptions.

The court decided that there was no sufficient consideration shown for said subscriptions, and upon that ground rendered judgment for the defendant for his costs. Exceptions by plaintiffs.

Edgerton & Allen for plaintiffs.

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1. The subscription of the defendant is the ordinary case of one made on a condition, to be complied with by the party in whose favor the subscription is made, and such subscription becomes binding when the condition is complied with. *Wm's. College* v. *Danforth*, 12 Pick. 541. *Amherst Acad.* v. *Cowls*, 6 Pick. 427.

2. The defendant, by signing the subscription paper, impliedly requested the plaintiffs to obtain like subscriptions to the amount of twenty thousand dollars, and when plaintiffs had obtained that amount, and in so doing incurred expense, the promise of the defendant became binding upon him, and cannot be avoided upon the ground of want of consideration. *Underhill* v. *Gibson*, 2 N. Hamp. 352. *Hames* v. *Dana*, 12 Mass. 190. *Bryant* v. *Goodnow*, 5 Pick. 228. *Farmington Acad.* v. *Allen*, 14 Mass. 172. *State Treas.* v. *Cross*, 9 Vt. 289. *Stewart* v. *Trustees Hamilton Coll.*, 2 Denio 403. *University of Vt.* v. *Buell*, 2 Vt. 48.

3. In this case a number of persons promise to contribute to a common object which they wish to accomplish, and the promise of each is a good consideration for the promise of the others. Chit. on Cont. page 46, note 1. *Stewart* v. *Trustees Hamilton Coll.*, 2 Denio 403, opinion of Walworth Chancellor. Gilchrist Dig. p. 71, Sec. 5.

J. W. Thompson for defendant.

1. The decision of the court was correct. 1. Because it does not appear the defendant was interested in the debt or the payment thereof, or that he was to receive *anything* for subscribing. 2. Neither does it appear plaintiffs were bound to raise $20,000 by the day, or that they agreed *to try*. 3. Neither does it appear plaintiffs incurred *any expense* in consequence of defendant's subscription. In all cases where subscribers to stocks have been held upon adjudication, *to be bound*, the *ground* has been the stocks or shares which the subscribers were to receive, furnished a consideration. In this case, it appears the subscription was to raise funds to pay a debt previously incurred by the donees, which *if any* was a *past* consideration. 11 Mass. 113. 14 Mass. 172. 2 Pick. 579. 6 Pick. 427. 7 J. R. 26. 21 Wend. 139. 2 Denio 403. 1 Compstock 581.

2. The payment of *part* of subscription is not sufficient to render same *valid*, neither should it be allowed to operate as an *estop-*

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pel in pais. Because this was done under a protestation he was not liable.

3. The subscription was only a promise *to make a gift* at a future day, which is void.

The opinion of the court was delivered by

ISHAM, J. This action is brought to recover the amount of a subscription made by the defendant to enable the Troy Academy to pay off its debts. The existence of the plaintiffs as a corporation, as set forth in their declaration is not disputed, and no suggestions are made by the defendant that his subscription was obtained by unjust or improper means, or that the trustees of that Institution do not design in good faith, to appropriate the money to the purposes and objects for which it was given.

The only matter of defense to which our attention has been directed, is the want of a legal consideration to sustain the promise. It is stated in the case, that this Institution was deeply in debt. That a necessity existed for raising the sum of $20,000 from among its patrons and friends in order to protect and preserve the property for the purposes and objects for which it was established. And that for the purpose of raising that amount, this subscription paper was circulated, and those measures adopted by the trustees of that Institution, which were deemed necessary and important for the attainment of that object. As the result of their exertions, we find that the whole sum was raised that was necessary by the terms of the instrument to render it binding on the various subscribers. It is obvious, that in raising that amount, there was, among the various subscribers to that fund, a community of interest and feeling, that the Institution should be enabled to prosecute the purpose of general instruction for which it was incorporated. That the subscription of one for that object, induced and influenced the exertion and subscription of others, is evident from the consideration that no obligation of payment was intended to have been created thereby, unless the whole sum of twenty thousand dollars was raised by the 1st of January, 1844. When the defendant, therefore placed his name to that subscription, with the sum he appropriated to that object, he contracted a two-fold relation, first, to the Institution itself, and in the second place to those with whom he had subscribed for that object. In his relation to the Institu-

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tion, it was an expression of his desire that the object should be accomplished, and if not expressed in form, it was equivalent to an express request, arising from the very nature of the transaction, that such exertions should be made and continued by the trustees, as were necessary for its final accomplishment, and justified those expenses and disbursements on their part, which were made, and were necessary to insure their final success. And in relation to other subscribers, the common object they had in view was to raise that full amount to relieve the Institution from its embarrassment and debts. For this reason an express provision was made that no obligation of payment should arise, unless that full amount was raised by a given time. This gave to each subscriber, an interest in the subscription of the other. If any were inoperative it affected the entire subscription, for to that extent their common object had failed. If any have paid their subscription, it will be a manifest fraud upon them, if other subscribers are permitted to avoid payment of theirs, for such payment has been made for an object that has failed, and which would have been avoided if they had complied with their promise and subscription, and the Institution is left under the same embarrassment and debts that existed before such payments were made. Whether we consider, therefore, the relation which each subscriber bears to the others, or to the Institution itself, we think that the defendant should be estopped from making such defense, or denying the obligation of his contract, for it operates alike fraudulently upon each.

If the trustees of that Institution could have anticipated such a defense, surely they would not have been to that labor, expense and disbursement to which they were subjected, in order to obtain the subscriptions. Nor would the co-subscribers have taken their respective obligations upon themselves, only in a reliance upon the good faith of the several subscriptions, and that thereby that amount would be paid, and the Institution be relieved from its embarrassment. We can hardly conceive of a case where the doctrine of estoppel has a more just and equitable application. For it is of the very essence of such estoppel "that a party shall not "be permitted to contradict an act which operates as a fraud on "his part, or as an injury to others, whose conduct has been in- "fluenced thereby." 2 Smith's Lead. Cas. 561, and cases there cited. Nor was it ever designed, in saying that a party may avoid

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an improvident contract by showing that no consideration existed therefor, that that principle should ever become an instrument in the hands of one, for the commission of fraud upon others.

But a sufficient consideration we think, is readily found in the case. A legal consideration may consist in loss, damage or inconvenience, sustained by the party to whom the promise is made, or of benefit or advantage to the party promising. The amount of the consideration is unimportant, nor is it necessary, in this State, that it should appear upon the face of the contract or agreement, as it may be proved by testimony *aliunde*. The consideration for this agreement is found in the obligation imposed upon, and assumed by the Trustees of this Academy to see to, and make the application of this money as directed by the subscribers to this fund, so as to enable this Institution to prosecute its duties of public instruction, for which it was incorporated, thus rendering this assumed liability and promise, the consideration of the promise of the other. To create this obligation upon this corporation or its trustees, it was not necessary that the instrument should have been signed by them, for that obligation arises from the acceptance of those subscriptions for that purpose, and which can be enforced at law and in equity. This was so expressly decided in the case of *Patchin* v. *Swift*, 21 Vt. R. 292. The court there say "that the accepting and adopting a written contract by a party, "who has not put his name to it, binds such party equally as if he "had signed such contract." And this must be considered as settled in this State, whatever may have been decided in the case of *Hamilton Coll.* v. *Stewart*, 1 Comp. R. 582. If that obligation rests upon the trustees of this Academy, and was created by obtaining and accepting these subscriptions, that it constitutes a sufficient consideration to sustain the promise of the defendant, is clearly sustained by the case of *Amherst Academy* v. *Cowls*, 6 Pick. R. 433. In that case the obligation was given for the support of indigent pious young men, and the consideration upon which it rested was the obligation of the trustees or the corporation to make such application. And this obligation was created not by having signed an agreement of that character, but arose, as in this case, from having accepted the subscription under those provisions. Upon the objection being made, that the agreement was without consideration, the court remark: "That it was *quite sufficient to create*

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"*a consideration, that the payee should have assumed an obligation* "*in consequence of receiving the note which he was compelled either* "*at law or equity to perform*, and if by means of his contribution, "or solemn promise to pay, the body to whom he has pledged his "word should encounter expense, become under legal obligations, "or otherwise pursue the intent and purpose of the legislature in "granting them the charter, this is a sufficient legal consideration "to support such a promise. In this respect the principles of "common honesty cannot be at variance with the law of the land." And upon a review of the authorities upon this subject, the court further say, "That we do not find that it has ever been decided "that where there are proper parties to the contract, *and the* "*promiser is capable in law of carrying into effect the purpose for* "*which the promise was made, and is in fact amenable to law for* "*negligence or abuse of his trust*, such a contract is void for want "of consideration." This seems to be now the settled doctrine in Massachusetts upon subscriptions of this character. In *Dartmouth College* v. *Woodard*, 4 Cond. U. S. Rep. 547, Ch. J. MARSHALL, speaking of contributions and subscriptions of this character, says, "That the consideration for which they stipulated is the "perpetual application of the fund to its object in the mode pre-"scribed by themselves." And upon this ground the case of *McAuley* v. *Billinger*, 20 John. R. 89, was decided. A different rule was adopted in the case of *Hamilton College* v. *Stewart*, 1 Comp. R. 582, and yet the principles adopted in that case, when applied to the rules fully established in this State, will here sustain a recovery on such subscriptions. The action was on a subscription to raise a fund for the use of the College. The first count was founded on mutual promises, and it was held that no recovery could be had on that count, for the reason, that the corporation had not executed the agreement and had not undertaken to appropriate the fund to the purposes designated. If they had executed the agreement, or if there had been an undertaking which could have been enforced to appropriate the fund as they designated, the subscription would have been binding and the consideration sufficient as founded on mutual promises.

That an obligation of that character does rest upon this corporation and its trustees, and that courts of law and equity will enforce that obligation, is sustained by the case of *Patchin* v. *Swift*,

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to which we have referred. And where that obligation exists, that case is a decided authority, that such subscriptions are legally binding. Their consideration rests upon mutual promises, and this view of the subject was taken by Chancellor Walworth in all the cases arising under the Hamilton College subscriptions.

The second count proceeded upon the ground that the subscription furnished evidence of a *request* that the plaintiffs should perform those services necessary to secure the amount of the fund. And the court properly remark, "That if that is the true con-"struction, the right of the plaintiff to the subscription money is "unquestionable." That that is a true construction of this agreement, and that such a request arises out of the very nature of the transaction we have considered. And this view of the subject is taken by Ch. J. NELSON. 2 Denio Rep. 403. In the case of *Patchin* v. *Swift*, the court remark, "That it is well settled, that "a consideration may be inferred from the terms and obvious im-"port of a written contract when it is not distinctly alledged and "set forth in the contract itself as a consideration." If this subscription had been signed by the corporation and contained a stipulation on their part to make the application of the fund as subscribed, or if it contained a request by the defendant for the plaintiffs to continue their exertions until the fund was raised, no one would question the legality or sufficiency of its consideration. And yet, that is the legal effect and operation of the instrument itself. All that, "is to be inferred from the terms and obvious import of this contract."

These principles have in various instances been recognized in New Hampshire, and the promise of each has been held to be the consideration for the promise of the other. *George* v. *Harris*, 4 N. Hamp. R. 533. *Society in Troy* v. *Perry*, 6 N. Hamp. R. 164. Chitty on Cont. 46. n. (1.) The cases in this State have been uniform in giving a legal obligation to such contracts or subscriptions. In the case of *The University of Vermont* v. *Buell*, 2 Vt. R. 48, the cases upon this subject were generally reviewed, and Ch. J. WILLIAMS, in the case of the *State Treasurer* v. *Cross & Day*, 9 Vt. R. 293, speaking of the case in the 2d of Vt. R. observes, "that from that case it appears that such contracts are not "void for want of a consideration." And in both cases a recovery was had on similar subscriptions. We think, therefore, the

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defendant is responsible on this subscription, and that a legal consideration exists to sustain it.

The judgment of the county court must therefore be reversed.

GEORGE AND CHARLES DAUCHY *v.* MILTON BROWN, ELISHA ALLEN, STURGES PENFIELD, AND MARSON EDGERTON.

[DECIDED JULY SPECIAL TERM, 1852.]

Pawlet Manufacturing Co. Liability of Stockholders.

The act establishing the Pawlet Manufacturing Company, was passed November 7, 1814. Section 5 of the said act contains the following provision: "That the "persons and property of said corporation shall be holden to pay their debts, "and when any execution shall issue against said corporation, the same may be "levied on the persons or property of any individual thereof." It was *held*, that this provision imposed upon the corporation a primary liability, and upon the stockholders a liability subordinate to and depending upon the liability of the corporation, and is a liability carved out and existing by the statute, and can have no existence independent of its provisions.

It was also *held*, that when a statute thus creates a liability and provides a remedy, the creditor is as much bound to resort to the act for the remedy given, as for the liability imposed for his security; and that in no case under such circumstances can the remedy be considered cumulative.

And it was further *held*, that when the statute provides that an execution issued against the corporation may be levied on any individual thereof; it implies a positive requirement, that such proceedings shall be had against the corporation upon which execution can issue, as a preliminary step, before proceedings can be had against the stockholders, for the indebtedness of the corporation must exist before the liability of the stockholders can arise; and that indebtedness can only be tried in a suit against the corporation in such a way, that those upon whom the execution may be levied shall be thereby concluded.

If a stockholder of such a corporation fraudulently dispose of his stock to avoid his liability, such transfer as against creditors will be absolutely void.

Such a corporation may connect the business of a store with the ordinary business of the corporation, and if the business is transacted in the name of the corporation, and for corporate benefit, and a creditor transacts business with them in that capacity and trusts the corporation for goods, he must enforce his claim against the corporation before the stockholders can be made liable, and cannot sustain an action against the stockholders individually.

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G. & C. Dauchy v. Brown et al.

DEBT. The declaration contains several counts; the four first, state an indebtedness to the plaintiffs by the Pawlet Manufacturing Company, and that by a provision in their charter the defendants are liable as stockholders, in their private and individual capacity. The remaining counts are on account stated, for goods and merchandise sold and delivered, for money had and received, paid, laid out and expended, under which plaintiffs seek to recover for same matters upon a common law liability, independent of any provision in the charter of the corporation.

This action came on to be tried, April term of the county court, 1851. Plea, the general issue and trial by jury,—BENNETT, J., presiding.

On trial, it was admitted that the goods specified in the plaintiffs' bill of particulars, produced on the trial, were purchased of the plaintiffs in the city of Troy, in the State of New York, at the dates specified therein, which was between the 24th day of November, 1849, and the 10th day of May, 1850, by the agent of the Pawlet Manufacturing Company, upon the credit of said company, and were brought to the store of said company in Pawlet, Vermont, and appropriated to the use of said company. It was also admitted, that the defendants were the sole stockholders in said company at the time said goods were purchased and used by said company, the amount due upon said bills being conceded for the purposes of the present trial.

The plaintiffs introduced the act incorporating the Pawlet Manufacturing Company, approved November 7, 1814, also the book of records of said company. The plaintiffs then offered to prove that the said company had for several years kept a store for the sale of such goods as are ordinarily kept and sold in a country store, in connection with their business of manufacturing cotton goods; and that the agents of said company had been accustomed to make purchases in market of such goods, and to dispose of them in said store, in part payment of the hands employed in said company's factory, and in part in the manner of an ordinary retail trade, with the knowledge of said defendants, and without objection on their part, and that the goods in question were disposed of in like manner.

The plaintiffs further offered to prove, that at the time of the respective dates of the transfer of the defendants Brown, Allen

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and Penfield of their stock, as shown by the book of records, to Edgerton, another defendant, that said Edgerton was insolvent, and that such transfers were made and received with intent to avoid liability on the part of said Brown, Allen and Penfield, for the plaintiffs' debt.

The defendants had not offered in evidence said transfers, and without objecting to the evidence, stated that they were prepared with testimony to show the contrary.

The court "*pro forma*" excluded the testimony offered as being immaterial, and decided that the action could not be maintained against these defendants; and directed the jury to return a verdict for the defendants. To which several decisions of the court, the plaintiffs excepted.

D. Roberts, Jr., and *E. Edgerton* for plaintiffs.

1. Act of incorporation passed November 7, 1814. Pamphlet, p. 61, Sec. 5.

First clause. "The persons and property of said corporation "shall be holden to pay their debts." This, though inartificially expressed, has this meaning, that the stockholders of said corporation shall be liable in their persons and property for the debts of the corporation. As in several acts passed at the same session.

The expression, "persons and property shall be holden," &c., means that stockholders shall be holden in person and property. *Southmayd et al.* v. *Russ et al.*, 3 Conn. 52. Taking this clause by itself the liability of the stockholders for corporate debts is announced.

The general law without more gives the remedy. *Southmayd et al.* v. *Russ et al. supra.* *Deming* v. *Bule*, 10 Conn. 409. *Middletown Bank* v. *Magill*, 5 Conn. 28. *Allen* v. *Sewell*, 2 Wend. 327. *Ex parte* Van Ripon 20 Wend. 617. *Bank of Poughkeepsie* v. *Ibbotson*, 24 Wend. 473. Ang. & Ames on Corp. 565.

The stockholders are not sureties or guarantors of the corporation, but primarily liable as principals and original debtors, as partners; with this provision, this is a qualified corporation, the liability of the stockholders as partners, under the corporate name, being not created by the act, but preserved as it existed without the act. 3 Conn. 52 *supra;* 2 Wend. 327 *supra.* *Moss* v. *Oakley*, 2 Hill 265; *Judson* v. *R. Galena Co.*, 9 Paige Ch. 598;

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Baily et al. v. ——, 3 Hill 188; *Haiger* v. *McCollough*, 2 Denio 123; *Corning* v. *McCollough*, 1 Compstock 47; 2 Kent Com. 272. A quasi corporation, Aug. & Ames 546.

Therefore, as the liability was not created by the statute, we are not confined to the statute for our remedy. 3 Conn. 52 *supra;* 20 Wend. 617 *supra;* 1 Compstock 47 *supra.* *Bank of Australasia* v. *Harding*, 19 Law. J. Rep. 345. *Bank of Australasia* v. *Nias*, 4 Eng. Law & Eq. Rep. 252.

This view is confirmed by the facts of the case.

There was an original partnership under the name of "Ozias Clark & Co." Under that name the members and subscribers apply for a charter, and the same members of the partnership are thereby made members of the corporation. Under the name of "Ozias Clark & Co." they meet and accept the charter. They make by-laws,—the 5th by-law declaring that the members shall share in *profit* and *loss*, and is the same old by-law of "Ozias Clark & Co." It is the old partnership with a new name.

The plaintiffs seek to charge the defendants as partners outside of the act of incorporation. By the act, the stockholders are to "have and enjoy all the privileges incident to corporations, for "the purposes of manufacturing all or any of the articles made "from cotton or wool," but for no other purpose.

This company has engrafted a new business upon their manufacturing business, to wit, the business of a retail country store. They are partners herein, and as such liable to pay for these goods, which were purchased and went to this extra corporate use.

The case cannot be likened to that of towns, counties, and school districts, &c.; these are called *quasi* corporations, and no action lies against them, unless given by statute. *Russell* v. *Men of Devon*, 2 T. R. 667.

But if given by statute, each inhabitant is liable to satisfy the judgment. 2 Kent Com. 274; Ang. & Ames, 566.

The statute directing the mode of proceeding with executions against corporations, applies to public and political corporations who may vote and levy a tax. *Bigelow* v. *Cong. Soc.*, 11 Vt. 287.

H. Allen and *C. L. Williams* for defendants.

1. The section of the act of incorporation upon which plaintiffs rely to sustain their action, is in derogation of the common law

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and of private rights, and therefore should be construed strictly. *Sprague* v. *Birdsall*, 2 Cowen 419. *Coolidge* v. *Williams*, 4 Mass. 140. *Strong et al.* v. *Speir*, 4 Hill 76. *Sharp* v. *Johnson*, 4 Hill 92. *Stone* v. *Wiggins*, 5 Met. 316. U. S. Dig. Vol. 3 p. 486, Sec. 117 and 115; U. S. Dig. 1848, p. 336, Sec. 12.

2. If an action at law might be sustained upon the first clause of Sec. 5 of the act, where no other remedy is prescribed, still such action cannot be sustained in this case, but the remedy prescribed in the last clause of that section must be adopted; for it is a familiar principle of law, that where the Legislature create a liability, and prescribe a remedy for enforcing that liability, no other remedy can be adopted. *Strong et al.* v. *Speir*, 4 Hill 76; *Calking* v. *Baldwin*, 4 Wend. 667; *Andover & Medford Turnpike Co.* v. *Gould*, 6 Mass. 40; *Franklin Glass Co.* v. *White*, 14 Mass. 286; *Sudbury M.* v. *Middlesex Canal*, 23 Pick. 36; *Dodge* v. *County Com'rs of Essex*, 3 Met. 380; Comyn's Dig. Vol. 1 p. 447; *Gedney* v. *The Inhab. of Tewksbury*, 3 Mass. 307; *Smith* v. *Drew*, 5 Mass. 514; *Stafford* v. *Ingersol*, 3 Hill 38; *Alney* v. *Hains*, 5 Johns. 175; *Andrews* v. *Callender*, 13 Pick.; *Kelton* v. *Phillips*, 3 Met. 61; *Child* v. *Coffin*, 17 Mass. 64; *Middlebury* v. *Hubbardton*, 1 D. Ch. 205; *Aldrich* v. *Londonderry*, 5 Vt. 441; *Aldis* v. *Hall*, 1 D. Ch. 309; *Rice* v. *Talmadge*, 20 Vt. 378.

The decisions in New York, cited, relate to acts of incorporation entirely different from the one in question, and therefore cannot be deemed decisions in point.

The proceedings of the partnership which existed previous to the organization of the corporation, can have no influence in the construction that is to be given to the 5th section of the act of incorporation. *Barker* v. *Esty et al.*, 19 Vt. 131.

It is a rule of construction, that where the meaning of a statute is doubtful, considerations arising from the injustice or inconvenience of a particular construction will have effect. *Rogers* v. *Goodwin*, 2 Mass. 475; *Putnam* v. *Longley*, 11 Pick. 487; *Ayres* v. *Knox*, 7 Mass. 306; *Gore* v. *Brazier*, 3 Mass. 523; *Langdon* v. *Potter*, 3 Mass. 215; *Harris* v. *Dorchester*, 23 Pick. 112; *Hunt* v. *Lee et al.*, 10 Vt. 297.

3. By the last clause of the fifth section of the act of incorporation, those only are made liable who are members at the time of

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the levy of the execution. *Marcy* v. *Clark*, 17 Mass. 330. *Leland* v. *Marsh*, 16 Mass. 389. *Kelton* v. *Phillips*, 3 Met. 61.

4. But if an action can be maintained upon the first clause of the *fifth section*, it can only be maintained against those who are members of the corporation at the time of the commencement of the suit. *Middletown Bank* v. *Magill*, 5 Conn. 28.

The opinion of the court was delivered by

ISHAM, J. The declaration in this case, which is in debt, contains several counts, the four first of which state an indebtedness to the plaintiff by the Pawlet Manufacturing Company, and that by a provision in their charter the defendants are liable as stockholders for the payment of that indebtedness in their private and individual capacity. The remaining counts are on an account stated, for goods and merchandise sold and delivered, for money had and received, paid, laid out and expended, and under which the plaintiff seeks to recover the same matters upon a common law liability, independent of any provision in the charter of that corporation.

The claim of the plaintiffs accrued between the 24th of November, 1849, and the 10th of May, 1850. The articles of merchandise constituting that claim were purchased of the plaintiffs by the agent of the Pawlet Manufacturing Company upon the responsibility and credit of the company, and were appropriated for their use and benefit. We learn from the case that the defendants were the sole stockholders in the corporation at the time the goods were purchased and used. The act of incorporation was granted Nov. 7, 1814, in which the persons therein named were duly incorporated by the name of the Pawlet Manufacturing Company, with all the powers and privileges incident to corporations. The manner of organization is therein directed, as well as the disposition and transfer of its corporate stock. The 5th section contains the following provision, "That the persons and "property of the said corporation shall be holden to pay their "debts, and when any execution shall issue against said corpora-"tion, the same may be levied on the persons or property of any "individual thereof."

The last clause of this act gives a construction to the former, so that that clause should read, that the persons and property *of*

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the members of said corporation shall be holden, &c. The object of the Legislature in that provision is very manifest. They intended to give the creditors of that corporation a right to enforce payment of their claims, not only against the corporate effects, but also against the persons and property of its several stockholders. And there should be such a construction of this provision as will carry into effect this intention, and enforce those liabilities created by this enactment. But whether that liability against the stockholders is to be enforced by a special action of this character, or in some other mode, is the important question arising in the case.

It is a common principle, and of frequent application, that where a statute creates a new right or imposes a liability that did not previously exist, and specifies no mode by which that right is to be protected, or liability enforced, that the common law will give that remedy, and ordinarily by an action on the case, or of debt on the statute.

We have illustrations of statutes of this character in acts of incorporations granted during the same session of the Legislature. The act incorporating the Addison Manufacturing Company, page 15, provides, "that the persons and property of the members of said corporation shall be holden for debts contracted by said corporation." And yet no mode is pointed out by which that liability is to be enforced. The charter of the Brattleboro Gun Factory Company, p. 75, provides, "that the private property of the stockholders shall be liable for the just debts of the corporation." In this charter the persons of the members are not responsible, though their property is, but no mode is pointed out to enforce that liability. The same provision is contained in the Saxton Village Cotton and Woollen Company, p. 81. In all these cases, there is no remedy only as it is found in the principles of the common law. It is equally well settled that where a new right is created by statute, or liability imposed that did not exist at common law, and the statute prescribes the manner of enforcing that right or liability, the remedy given by the statute must be adopted, and the liability can be enforced in no other way. Statutes also frequently afford cumulative remedies, and do in all cases where a right existed, or a liability was imposed at common law, and a statute intervenes giving a new method of enforcing that right or liability without the use of negative words. In such cases the

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party at his discretion may resort to his remedy at common law, or to the remedy given by statute. 3 Hill Rep. 39, *Stafford* v. *Ingersoll.* 5 John. Rep. 175, *Almy* v. *Harris.* 6 Mass. Rep. 44. 14 Mass. Rep. 289.

These general principles have been urged by counsel in the argument of the case. Their correctness has not been disputed, but the difficulty in this investigation exists in a proper application of these general rules to the case under consideration. The first clause of the 5th section of this charter declares the liability of the stockholders to pay the company debts. Without this provision in the charter, evidently no such liability would exist. Angel & Ames in their treatise on Corpts., p. 470, observe, "that "one of the properties of a private aggregate corporation is the "irresponsibility of its members for company debts, and that they "are not liable beyond the amount invested in their subscription "for stock." And TILGHMAN, Ch. J., in *Myers* v. *Irwin*, 2 Sergt. & Rawl. 371, says, "The personal responsibility of the stockholders is inconsistent with the nature of a body corporate." The object in granting such charters is to shield its members from such personal responsibility, and it was formerly deemed a matter of public policy so to grant them, as individuals were induced to invest a portion of their property for the purposes of trade and public improvement, who otherwise would abstain from so doing, were not their liability thus limited. Such is the legal operation of acts of incorporation where no provision of that character is introduced.

But where such provision, declaring the personal liability of the stockholders, is introduced, with the manner of enforcing it, its legal effect, and the remedies thereon, is a matter of much difficulty and doubt.

It has been urged in this case, that the provision creates a qualified corporation, or a corporate body for specific purposes only, having the right to sue and be sued, and otherwise to manage the affairs of the company. But in their relation to creditors, that they are held liable as members of an ordinary partnership, or as members of an unincorporated company, the same as if no act of incorporation had been granted. Or in other words, that in that particular relation and the duties arising therefrom, they have never been incorporated.

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On the other hand it is insisted, that the charter, with such a provision, creates a corporate body, with all the rights and incidents of a corporation, and that for any matter arising, during the existence of the corporation, upon its credit and for its sole use and benefit, the individual members are not liable therefor as partners, or as members of a voluntary association; but that the provision of the act creates a new right for the creditor, and imposes a liability on the members, that does not otherwise exist, and which has its origin and existence only in that provision of the act.

It is upon the effect, produced by incorporating that provision in the charter, that the cases to which we have been referred have their more direct application, and a determination of this question, virtually makes a final disposition of the case.

The importance of this question arises from its bearing upon the last clause of the 5th section of the act incorporating the Pawlet Manufacturing Company. For the section which declares the liability of the stockholders, does in the last clause point out a way in which that liability can be enforced. And if the provision declaring the liability of the stockholders, creates simply a qualified corporate body, leaving the liability of the members as it would be at common law, without the act of incorporation, then the remedy given by this statute is merely cumulative, and this action, as at common law, can be sustained against the stockholders. But if this liability does not exist at common law, or independent of that provision of the act, and is created solely by the statute, then the remedy given by the statute is not cumulative, and this action cannot be sustained. The remedy of the creditor in such case is only as directed by the act, in obtaining a judgment against the corporation, and levying an execution thereon upon the corporate effects, or the property of the individual stockholders.

From the decisions in the state of New York it is evident that the remedy so given by the act is merely cumulative, and that stockholders under such a provision in their charter are held liable as partners, upon a common law liability. This is the language of Judge JONES in *Corning* v. *McCollough*, 1 Comp. Rep. 47, and his opinion is in accordance with the generally expressed views of their court, as given in the several cases to which we

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have been referred. That case was upon a provision in the charter of the Russie Galena Company, which "provided that the "stockholders shall be jointly and severally personally liable for "the payment of all debts and demands contracted by the corpo- "ration, and that any person having any demand against the cor- "poration may sue any stockholder in any court having cogni- "zance thereof." The defendants plead that the cause of action did not accrue within three years and to which there was a demurrer. The court held the action not barred in that period, as the suit was brought upon an individual liability existing independent of the statute. It is unnecessary to examine the various authorities from that State to which we have been referred. It is sufficient to say that the doctrine seems well settled there, that such a provision in a charter creates a qualified corporation simply, that the liability of its members exist at common law, and the remedy given by the statute as cumulative, to which, or that at common law, the creditor at his discretion may resort.

In Connecticut, where this subject has been much discussed, much difference of opinion has been expressed. The case of *Southmayd* v. *Russ*, 3 Conn. Rep. 52, arose upon a provision in the charter of a Manufacturing Company, "That the persons and "property of the members of the corporation *should at all times* "be liable for all debts due by said corporation," the act pointing out no remedy, it of course is to be found in the principles of common law. Ch. J. HOSMER, who gave the opinion of a majority of the court, held the liability of the stockholders to be the same as if no act of incorporation had been granted, and were the same as members of a voluntary association. It is to be observed, however, that his opinion rests upon the phraseology of the act in the use of the words, "liable at all times." These words he considered created a personal liability on the members the moment the debt was contracted. The case therefore can have no definite application to cases where those words are not contained in that provision of the charter. The question, however, was again re-examined in the case of *Middletown Bank* v. *Magill*, 5 Conn. Rep. 28. This case arose upon the same charter, and it was held that an action of assumpsit would not lie against stockholders who were such at the time the debt was contracted, but who had transferred their stock before the commencement of the suit. Ch. J.

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HOSMER, who dissented from the opinion of the court, held the action maintainable on the ground that they were liable as partners, as if no act of incorporation had been granted, and that such liability was created the moment the debt was contracted, and relied upon the case of *Southmayd* v. *Russ*, as having decided the question then before them. The majority of the court held otherwise, and in their decision used this emphatic language: "That the creditor did not give credit to the stockholders as such; they in no sense of the word were debtors; they like the inhabitants of towns may be compelled to pay while they remain members, not as debtors, but as guarantors. The corporation is the real debtor, and the members while such, its surety."

On this construction of that provision, two things necessarily follow. In the first place, that the insertion of such a clause in an act of incorporation has some other effect than simply to create a qualified corporate capacity. It creates a corporate body with all the powers and privileges incident to any corporation, empowers them to direct, not only the management of corporate duties, but defines also the relation which exists between them and their creditors, by imposing upon the corporation a primary liability, and upon the stockholders a liability subordinate to, and dependent upon the liability of the corporation. In the second place, it is evident that if such is the character of that liability, it is not one that exists at common law. It is not that of partners, or as members of a voluntary association, for in that event their liability would not have been discharged by a transfer of their stock. But it is a liability carried out and existing by the statute, and which can have no existence independent of its provisions. And when a statute thus creates a liability and provides a remedy the creditor is as much bound to resort to the act for the remedy given, as for the liability imposed for his security. In no sense, under such circumstances, can the remedy be considered cumulative.

In Massachusetts, it has been the policy from an early period to increase the liability of individual stockholders in manufacturing corporations for the debts of the corporation. Their act of 1808 not only created a personal liability on the stockholders, but further provided that when an execution shall issue against a manufacturing corporation, and the same is not paid by a limited

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time, "the officer shall serve and levy the same upon the body or "bodies and real and personal estate of any member or members "of such corporation." It will at once be perceived that there is a substantial similarity between the statute of Massachusetts and the 5th section of the act incorporating the Pawlet Manufacturing Company, and that a proper construction of one will aid in the construction of the other.

In the case of *Child* v. *Coffin*, 17 Mass. Rep. 64, it was held that an execution thus issued could only be levied upon the estate of such as were members at the time of the commencement of the suit, and that the decease of a member before suit, discharged his estate from any liability. This decision is entirely incompatible with the idea of their liability as partners, or that an action upon a common law liability can be sustained. For if such liability existed, the death of the party would not discharge his estate. The same principle was also recognized in the cases of *Bond* v. *Appleton*, 8 Mass. Rep. 472, and in *Cutler* v. *Middlesex Factory Co.*, 14 Pick. Rep. 484. *Ripley* v. *Sampson*, 10 Pick. Rep. 372. *Andrews* v. *Callender*, 13 Pick. Rep. 490. In this last case, PUTNAM, J., says that "the liabilities of the individual members "of the corporation are created by the statute, and it is clear "that at the common law the corporation only would be liable." This being the law under the act of 1808, we are informed, 2 Amer. Jurist 95, that the Legislature were not satisfied; which gave rise to the act of 1817, by which the persons and property not only of members of the corporation, but of persons who were members at the time the debt accrued, are made liable to be taken on an alias execution.

It would be difficult to find legislation and judicial construction of that legislation more applicable than this to the case under consideration. For if under the act of 1808 the members were liable as partners or in any way independent of the statute, then the act of 1817 was unnecessary. But as no such liability existed at common law, but was created by statute and could not be extended beyond its provisions, the act of 1817 was necessary to create such extended liability. The case of *Kelton* v. *Phillips*, 3 Met. Rep. 62 was decided in 1841, upon the act of 1808, and upon a review of all their decisions, and it would seem must place this question at rest in that State. It was held, that the qualified

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liability of an individual member of a Manufacturing Company under the act of 1808, was not such a debt as could be proved against the estate of an insolvent debtor. Ch. J. SHAW in delivering the opinion of the court, says: "The construction uniformly "put upon the act of 1808 has been, that it was a new remedy "given by statute, and as the mode of pursuing it was specially "pointed out, that mode must be pursued; that it did not create "a legal liability to be enforced by action." It would be difficult to introduce language more emphatic or applicable. There is then the whole current of Massachusetts authority, in connection with the case in the 5th of Conn. Rep. establishing the principle that such a provision in a charter of incorporation creates a new right and imposes a new liability — one that did not exist and cannot be enforced by action at common law. That the remedy given by the statute is not cumulative, but is the only remedy to which the creditor can resort for payment of his debt. And after much investigation and reflection we can but think this to be the proper construction of the act, and of that provision in the charter of the Pawlet Manufacturing Company, and as best calculated to carry into effect the intention of the Legislature.

This construction naturally arises from the language of the act itself. When the statute provides that an execution issued against the corporation may be levied on any individual thereof, it implies a positive requirement that such proceedings shall be had against the corporation upon which execution can issue, as a preliminary step before proceedings can be had against the stockholders.

The reason and propriety of this is apparent. The indebtedness of the corporation must exist before such liability can arise, and that indebtedness can only be tried in suit against the corporation in such a way, that those upon whom the execution may be levied shall be thereby concluded. If a judgment is obtained against the corporation, not only is the corporation, but all its members are concluded on the question of indebtedness.

But if in this suit judgment should be obtained against the stockholders, although they may be estopped to deny such indebtedness, yet the corporation is not so concluded. This was the opinion of BRISTOL, J., in 3 Conn. Rep. 57, and of SPENCER, Ch. J., in 20 John. Rep. 66. It would be a violation of any rule, to give a construction to a statute, that leads to so gross an inconsistency.

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This construction is deemed not only legal, but founded in strict equity. It is equitable as against the creditors for they have preserved for them the liability of those on whose responsibility the claim arose, and there is no equity in enforcing the claim against individuals upon whose credit, as the case finds, the goods were never purchased. If the execution is levied upon members who became such after the debt has accrued, they voluntarily have subjected themselves to that liability, having the means to satisfy themselves of the solvency of the company if they choose to make inquiry. And if they have given but the value of the stock, they have become the purchasers, under an understanding to pay such liabilities, for the value of the stock is found after deducting the liabilities of the corporation. Inhabitants of towns are liable to have their property taken for the debts of the town, though they became members after the debts accrued.

The suggestion which has been made against this construction of the act, that a stockholder may fraudulently dispose of his stock to avoid his liability, can have no controling influence, for it has been too frequently decided to be considered as an open question, that such transfers as against creditors, are absolutely void, that, as to them, they are to be considered still as members, and that an execution can be levied upon their personal and real estate, as if no transfer had been made. Such was the decision in *Marcy* v. *Clark*, 17 Mass. Rep. 330. *Middletown Bank* v. *Magill*, 5 Conn. Rep. 70, and in *Roman* v. *Fry*, 5 J. J. Marsh Rep. 634. That an ample remedy against such fraudulent sales can be found by the creditors in the doctrine of those cases, and in the powers of a court of chancery, is fully sustained upon principle as well as authority.

We can see no propriety either in charging these defendants as partners, for the claim of the plaintiffs from the consideration that the company had a retail store connected with the business under their charter. The case finds that the goods were bought of the plaintiffs by the corporation, were charged to the corporation, and purchased upon its credit and responsibility, and were appropriated to the use of the company.

The liability of the corporation for this claim, has not been disputed, nor can be the liability of its members, when that liability is enforced according to the provisions of the charter, and as the

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parties contracted. There is no propriety, therefore, in these plaintiffs putting in issue the question whether that corporation in any of its business transactions, transcended its corporate powers, so long as there is preserved for them that liability upon the faith of which the debt was contracted. Independent of that consideration, also, we perceive no impropriety in connecting the business of such a store with the ordinary business of the corporation. It is necessary and important for the convenience and benefit of their operations, as well as for a successful prosecution of the business for which they were incorporated. And as the business was transacted in the name of the corporation, for corporate benefit, and the claim of the plaintiffs contracted in that capacity, it must in that capacity be enforced.

The result is that the judgment of the county court must be affirmed.

JAMES PORTER *v.* JIRAH VAUGHN.

Audita Querela. Demurrer. Execution may issue in some cases, after a year and a day.

The writ of *audita querela*, is an important remedial and equitable process, and should be allowed in cases where an execution has been irregularly issued, and from which the party should be relieved, and it should at least be a concurrent remedy, with that relief which is granted on motion.

The complainant brought his writ of *audita querela*, and upon *demurrer* it was held, that where an execution has been issued from a court of law, this writ cannot be sustained, to vacate the same, or suspend its operation, on the ground that it has been enjoined by the court of chancery, and that the remedy of the complainant is only to be found by application to the chancellor.

If there has been a stay of execution, and the party prevented from issuing the same, execution may issue after the year, without *scire facias*, and if a judgment be with *cesset executio*, by agreement until such a time, there need be no *scire facias*, until a year and a day after the time agreed upon, even though such *cesset* is not entered upon the roll.

AUDITA QUERELA. The Complainant alledged in his declaration, that at the April term of the Rutland County Court, 1844,

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the said Jirah Vaughn recovered judgment against the complainant, for the sum of $1268.66, damages, and the sum of $20.19, costs of suit; which judgment so entered, was by consent of parties under the following rule of court: that no execution issued until after the adjourned court of chancery,—judgment to remain subject to said court of chancery as to further stay, until the determination of suit, then and still pending in said court of chancery, between complainant and Jirah Vaughn; that, at the time of the rendition of the judgment aforesaid, a suit in chancery was pending in favor of complainant against Jirah Vaughn and one Reuben R. Thrall, which was the suit referred to in the rule aforesaid, and said suit has ever since that time been prosecuted in said court. That on the 10th day of April, 1843, an injunction was issued by said court of chancery, strictly enjoining said Jirah from prosecuting said suit at law; that said injunction was not removed at the adjourned term of said court of chancery referred to in the rule aforesaid, that ever since the issuing of said injunction, the same has been at all times, and still remains in full force, &c. And further complains that said Jirah Vaughn at divers times after the rendering of said judgment at the said April term, 1844, has taken out executions upon said judgment, one of which executions was issued by the Clerk of said Rutland County court, and dated the 20th day of January, 1846; that after said last mentioned day, to wit, on or about the first day of April, 1847, more than a year and a day after the issuing of said execution on said 20th day of January, 1846, said Jirah took out a pluries execution upon said judgment, signed by F. W. Hopkins, Clerk of said Rutland County court, and complainant avers that said execution was not issued on the 19th day of January, 1847, but was issued on or about the 1st day of April, 1847, and was by said F. W. Hopkins, dated the 19th day of January, 1847, by reason of which said failure to issue an execution within one year and a day after the said 20th day of January, 1846, said Jirah lost all right to issue executions upon said judgment, if such right he ever had. And that said Jirah, on the 22d day of April, 1848, took out a writ of execution upon said judgment, for the sum of $1268.66 damages, and the sum of 20.19 costs, with further sum of one dollar and twenty-five cents for said execution, and four former, signed by F. W. Hopkins, Clerk of said county

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court, and put said execution into the hands of Jacob Edgerton, Sheriff of the county of Rutland, aforesaid, to levy, serve and return, and said Jacob Edgerton threatens to levy said execution upon the goods, chattels or estate of complainant, or to arrest the body of complainant, and him commit to jail, unless this complainant shall pay said execution with interest and officer's fees thereon — by all which the said James Porter, as he says is, &c., and has suffered damages to the sum of five hundred dollars.

To this complaint defendant demurred.

The county court, September term, 1851,— COLLAMER, J., presiding, rendered judgment that the declaration is sufficient, and entered judgment for the plaintiff, that execution mentioned in the declaration be set aside, and for his costs. Exceptions by defendant.

Thrall & Smith for defendant.

1. The plaintiff's declaration shows that before and ever since said judgment, the defendant has been restrained, by acts of the plaintiff, from taking execution. Hence it is not for plaintiff to complain that execution was not issued before it was. *Mitchell* v. *Cue and wife*, 2 Bar. 660. *Fletcher* v. *Mott*, 1 Aik. 339.

2. It is essential that the declaration should show that the party aggrieved has some matter which he might have availed himself of in defense, had *scire facias*, or debt been brought, instead of taking the execution. The judgment is valid and unsatisfied. The count is defective in substance. *Staniford* v. *Barry*, 1 Aik. 321. *Porter* v. *Vaughn*, last term here, 1 Salk. 93, 1 Wilson 98.

3. *Audita querela* cannot be sustained in a case like this. It only lies to relieve from void process. *Betty* v. *Brown*, 16 Vt. 670. *Sawyer* v. *Doane*, 19 Vt. 598. Bing. on Ex. 13, and cases cited. *Finney* v. *Hill*, 13 Vt. 255.

The appropriate remedy would have been by motion to the court, when any error could have been corrected. At least, such should have been the remedy first sought. *Allen* v. *Carpenter*, 7 Vt. 397. *Porter* v. *Vaughn*, last term here. *Smith* v. *Rix*, 9 Vt. 241. 2 Aik. 248.

M. G. Evarts and *Foot & Hodges* for plaintiff.

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1. The declaration is based upon the *legal presumption* of payment, which arises in all cases, after a year and a day, and plaintiff can avail himself of this presumption, and need not alledge it in his declaration. Chit. on Pl. 221.

2. It cannot be denied that an execution so issued would be set aside on motion. A motion is only a modern substitute for *audita querela*, which is concurrent with it as a remedy, and will lie in some cases, where a motion will not. 4 Com. Dig. 257 (execution I. 4.) Bing. on Ex. 264 note. 2 Chit. R. 384.

Audita Querela is a more appropriate remedy than the one by motion, for two reasons,—

1. The issue of fact which arises upon the declaration could not be tried upon motion.

2. The remedy by motion is only available during the session of court; *audita querela* is open to the party at any time, and is the proper remedy, and they are concurrent remedies. 1 Aik. 339. 7 Vt. 397. 17 Vt. 253. 19 Vt. 43. 4 Mass. 483. 1 Ld. Raymond 439. 2 Wm. Sand, 148 (b.) 4 Com. Dig. 457.

The opinion of the court was delivered by

Isham, J. The questions in this case arise upon a general demurrer, and it is insisted on the part of the defendant that this writ cannot be sustained upon the facts set forth in the complaint.

The writ of *audita querela* was considered by this court in the case of *Staniford* v. *Barry*, 1 Aik. Rep. 323, to be in the nature of a bill in equity, and designed to afford specific and certain relief from the wrongful acts of a party who is seeking to enforce the final process of a court of law, in cases where it has become illegal and inequitable to have it thus enforced. As a general rule, it is confined to matters arising subsequent to the rendition of the judgment, as the judgment is, and should be conclusive upon all matters embraced within it. Yet it has been held to extend to matters arising previous to the judgment, if the party has been deprived of an opportunity in court, to avail himself of the matters in his discharge.

At common law it afforded a very extensive remedy; and relief was granted in all cases where an execution was irregularly issued. To a great extent the remedy by this process under the present system of English practice, has been superseded by grant-

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ing a more summary relief on motion. It is evident however, that this *summary relief* does not take away the remedy by this writ. Bingham in his treatise on executions, 265 (e) says that "this writ formerly was the only means of redress; in cases where now relief is granted on motion." Thus making this writ, at common law, a concurrent remedy, with the relief granted on motion. From the case of *Foot* v. *Cremer*, 1 Ld. Raymond 439, it appears that Lord Holt considered this writ as more extensive in affording relief, than that by motion, and that it should be resorted to where the matters complained of are disputed, so that an issue may be properly formed in the pleadings, for trial by the court or jury.

These principles in relation to this writ have an important application in this State, under our system of practice. The difficulty of obtaining that summary relief granted on motion, and its want of adaptation to the practice of our courts, renders this writ an important remedial and equitable process, and it should be allowed in cases where an execution has been irregularly issued, and from which the party should be relieved, and should at least be a concurrent remedy, with that relief which is granted on motion.

By the demurrer to this complaint, it is admitted that the judgment upon which this execution is issued, and which is sought to be vacated, was rendered at the April term of the county court for this county, A. D. 1844. Upon this judgment, several executions have been issued. The last execution was dated April 22, 1848. and which the complainant says the defendant threatens to levy on his person and property, and from which this relief is sought. The objection is not made to this execution, that it issued after the expiration of more than a year and a day from the former, but the objection is urged against the one issued the next previous to this. And the demurrer admits that the execution dated January 19, 1847, was in point of fact issued about the 1st of April of that year, and more than a year and a day after the issuing of the previous execution, on the 20th day of January, 1846, and the complainant insists that the execution so irregularly issued is void, and that he should be relieved therefrom, and from all those subsequently issued on that judgment, and that no execution can be henceforth issued until the judgment is revived by scire facias.

The demurrer also admits that at the time of the rendition of

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the judgment in April, 1844, the same was rendered under a rule entered upon the calendar, that no execution should issue until after the adjourned court of chancery, and the judgment was to remain subject to the order of the court as to the further delay of the execution until the determination of the suit in chancery. It is further admitted by the demurrer, that on the 10th day of April, 1843, the suit upon which this judgment was rendered was enjoined by the chancellor, and that the injunction upon this suit has never been removed, but still remains in full force.

For these several reasons, it is insisted that the executions have been irregularly issued, and that by this writ, the complainant should be relieved from the execution with which he is threatened. There is, however, no cause of complaint in consequence of the rule entered at the time of the rendition of the judgment in 1844, for that rule expired by its own limitation, after the adjourned court of chancery. The parties evidently sought for that extension only for the purpose of seeking further relief at that time, from an order of the chancellor, and when that period arrived the order could have no further effect in delaying the issuing of the execution.

A more important question arises from the injunction granted by the chancellor, from any further proceedings in that suit. The issuing of the executions was a manifest violation of the injunction, but the question arises, can relief be sought in this court and by this writ, or should the complainant apply to the chancellor for him to protect his own orders, and enforce his own decrees. It is to be observed that an injunction does not operate upon the judgment execution, or proceedings in court. It is never intended to interfere with, or control the decisions or administrative rights of the courts of law. But the injunction acts on *the party* as subject to the jurisdiction of a court of equity. And the chancellor enforces his orders and decrees on the ground of his jurisdiction, not over the court of law, but over the parties to the suit at law. This was early decided in the English chancery courts, and has ever since been regarded as the ground upon which these proceedings rest. Leading Eq. Cases, part 2, page 82, 92, and cases cited.

There is, therefore, great propriety in leaving to the court of chancery, the enforcement of its own rules, and the deciding whether the party has been guilty, or not, of a violation of the order

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and injunction of the chancellor. It is a matter over which a court of chancery can exercise discretionary power, and enforce its decrees and injunctions under rules and powers peculiar to that court. Where, therefore, an execution has been issued from a court of law, this writ cannot be sustained to vacate the same, or suspend its operations, on the ground that it has been enjoined by the court of chancery, and we entertain no doubt, that for that cause, the remedy of the complainant is only to be found by application to the chancellor.

The only remaining ground upon which this writ can be sustained to vacate that execution, is that an intermediate execution was issued after more than a year and a day from the former. At common law it is well settled that an execution so issued is irregular, and that as a general rule it will be vacated by this writ. The principle upon which it is so held is thus stated in Bac. Abj. tit. Extin. (H) "where a party lies quiet so long after his judg- "ment, it shall be presumed he hath released the execution, and "therefore the defendant shall not be disturbed without being "called upon, and having an opportunity of pleading the release, "or showing cause if he can, why the execution should not issue."

This doctrine has been recognized in this State, in the case of *Fletcher* v. *Mott*, 1 Aik. Rep. 339. To this rule, however, there is this exception,—if there has been a stay of execution, and the party prevented from issuing the same; the execution may issue after the year, without *scire facias*. Several of the cases under this exception are given in 4 Com. Dig. 257. If the execution is stayed by the pendency of a writ of error, scire facias need not be brought. If a judgment be with *cesset executio* by agreement until such a time, there need be no scire facias until a year and a day after the time agreed, though such *cesset* is not entered upon the roll.

These principles were sustained by the Supreme Court in the case of *Fletcher* v. *Mott et al.*, and the court in that case remark, that if the cause is delayed by injunction out of chancery, execution may issue after the year without scire facias; and these principles we think are decisive upon this part of the case.

The complainant himself, sets forth the existence and pendency of the injunction from 1843 to the present time, and it is admitted by the defendant in his demurrer. The case, therefore, is shown

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to be as clearly within the exception of that rule, as if the suspension of that execution had been created by the pendency of a writ of error. Although the defendant has issued executions in contravention of the injunction, yet when the injunction is removed, he may obtain a regular execution on the judgment within the year after such removal. As the injunction in this case still exists, the remedy of the party is to be found only by application to the chancellor.

However favorable therefore, we may regard this writ, and feel disposed to extend it to cases where a party should be relieved from an execution, we cannot consider any of the matters urged in this case as proper matters for relief under this process.

The result is, that the judgment of the county court sustaining the writ, must be reversed.

BENJAMIN P. BARTLETT v. HARVEY Z. CHURCHILL.

Assault and Battery. Evidence under the replication of de injuria to plea of son assault demesne. Referees.

In an action of *trespass* for assault and battery, where the defendant plead *son assault demesne*, and the plaintiff replies *de injuria sua propria*, the plaintiff may prove that defendant used more force than was necessary, and that an excessive battery was committed.

And these pleadings present two questions of fact to be tried and decided; first, did the plaintiff commit the first assault; secondly, if so, did the defendant use any more force than was necessary in his defense.

And where, upon this issue, these facts are not found by the referees or the county court, and no question of law arising in the case, the supreme court will not decide whether the defendant is guilty or not guilty, for these are questions exclusively to be found by the referees or the county court; it being the duty of the supreme court only to decide upon such legal questions as may arise upon facts previously found to be true.

TRESPASS for assault and battery. Plea, *son assault demesne;* the plaintiff replied *de injuria.* The suit was referred under a rule from the county court, and the referees reported the following facts:

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"That on the third day of June, 1849, a colt of the defendant "got into the meadow of plaintiff. The plaintiff sent his boy to "the defendant, requesting him to take his colt out. The defend- "ant went to the plaintiff's house and informed him that his fence "was down, and that it would be of no use to take the colt out, "unless the fence was repaired. The plaintiff denied that his "fence was down, and both parties thereupon went to the place, "where the affray complained of took place. It appeared that "the fence was a line fence, running east and west between the "parties, and that it was plaintiff's duty to keep that part of it, "where the affray took place, in repair. The fence consisted of "a quantity of loose stones drawn together and scattered along "several feet wide, and one or more feet high, for the purpose of "being builded into a wall, on which rails had been laid. At the "time spoken of some three lengths of them were thrown down, "so as to present no obstruction to said colt in passing over into "plaintiff's meadow, and said colt was then in the said meadow. "When the parties arrived at this point some conversation ensued "between them, the purport of which did not appear, when the "defendant who was on the south side of said fence and on the "plaintiff's land, passed over the fence on to his own land, on the "north side of said fence, and plaintiff commenced laying some of "the rails on the wall. He had laid one or two rails on the wall, and "had another in his hands, bringing it on to the wall, when the "defendant stepped on to the wall, towards the south and near "the west end of the rail, which the plaintiff had in his hands, "which he held, as he stood with his face towards the north, "nearer the west than east end of said rail, with the east end in- "clining towards the ground; and as the defendant stepped on to "the wall the plaintiff brought the west end of the rail round "against him and pushed him back off the wall. The defendant "immediately stepped back on to the wall, towards the plaintiff, "when the plaintiff raised both hands to thrust him back. As he "attempted to push him back, defendant caught him by the arm "and brought him over the wall on to the defendant's land, and "on to the ground, and held him down a short time, when he suf- "fered him to get up. The plaintiff then advanced towards the "defendant in a hostile manner, when the defendant pushed him "off down the hill, (the ground being descending towards the

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"east); the plaintiff advanced once or twice after that towards "the defendant in a threatening attitude, and the defendant pushed "him off with more violence and a greater distance each time, "and the last time, the plaintiff fell to the ground; the plaintiff "then advanced towards the defendant again, and as he advanced "picked up a stone, and raised his hand as if to throw it, when "the defendant sprang forward and seized him and threw him on "to the ground with some violence and held him down, when the "plaintiff asked him what he wanted. The defendant replied "that he wanted him to put down that stone; the plaintiff refused "to do so, when the defendant struck him several blows on the "side; the plaintiff then relinquished the stone, and the defendant "released him, and the parties separated. And that during this "affray, the plaintiff received some slight injuries on his face and "hip, and an injury in the back part of his neck, which has re-"sulted in rendering his neck stiff. It appeared that there had "been an unfriendly feeling between the parties for some time "previous to this affray.

"If from the foregoing facts and the pleadings in the case, the "court should be of the opinion that the defendant is guilty, the "referees find for the plaintiff to recover one hundred dollars dam-"ages, and his costs. If from the foregoing facts and the plead-"ings in the case, the court should be of opinion that the defend-"ant is not guilty, they find for the defendant to recover his "costs."

The county court, April term, 1851,—BENNETT, J., presiding, —*pro forma*, rendered judgment upon the report for the plaintiff. Exceptions by the defendant.

Briggs & Conant for defendant.

S. H. Hodges and *E. L. Ormsbee* for plaintiff.

The opinion of the court was delivered by

ISHAM, J. This case is brought here on a report of referees, on which the county court rendered judgment *pro forma* for the plaintiff. The question has arisen whether under the replication of *de injuria* to the plea of *son assault demesne* evidence can be received and a recovery had for an excessive battery. This re-

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plication is considered merely as a simple denial of the facts stated in the plea, and the evidence should be confined to the facts there stated, as they only are put in issue by the pleadings.

Under the English practice and by a uniform course of decisions in their courts there can be no doubt that evidence of an excessive battery could not be received under this issue. A new assignment would be necessary, making the excessive battery the substantive ground of recovery, as they consider the only matter put in issue under such a state of pleading, is the inquiry, Who first commenced the assault?

A different rule has however been adopted in Massachusetts, 15 Mass. Rep. 365, and in New Hampshire, 2 N. H. Rep. 347; and also in this State in the case of *Elliot* v. *Kilburn*, 2 Vt. Rep. 474. In these last cases, the courts held the averment "that the "defendant used no greater force than was necessary for his de- "fense," to be the material part put in issue by the replication, and consequently evidence showing that more force was used, and that an excessive battery was committed, was properly admissible as being within the issue formed. The pleadings in this case are similar to those in the 2d of Vt. and the question now presented was there considered and decided, and we are not at liberty to treat the question as open for further consideration. So far therefore as the admission of testimony under this issue is concerned, there is no reason for reversing the judgment of the county court.

But from an examination of this case, as it appears from the exceptions and the report of referees, we think a rehearing must be had in the case, for the reason, that no facts are found upon which a judgment can be rendered under the issue formed by the pleadings. The pleadings present two questions of fact to be tried and decided. Did the plaintiff commit the first assault, and if so, did the defendant use any more force than was necessary in his defense?

On these questions the referees have made a special report of the testimony which they admitted and heard, and from which they should have found the facts whether the first assault was made by the plaintiff, and whether the defendant's battery was excessive. But these facts are not found in the case. The referees have expressed no opinion on the subject and have drawn no conclusions from the testimony whatever. There is no ques-

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tion of law arising in the case. The referees, after reporting the testimony, say, if the court are of opinion that the defendant is guilty then they find for the plaintiff, otherwise for the defendant. Now when no question of law exists, it is not for this court to say whether the defendant is guilty or not guilty. That is a question exclusively to be found by the referees or the county court. It has uniformly been held that this court can try no question that is to be ascertained by weighing evidence or drawing inferences therefrom. It is the duty of this court only to decide upon such legal questions as may arise upon facts previously ascertained and found to be true.

Possibly the difficulty might have been avoided if the county court had drawn their inferences from the testimony and facts reported by the referees, or had they tried the case on the report and rendered a judgment thereon, as the facts might have been considered as impliedly found in such judgment. But the questions not having been considered in either place, and the judgment being *pro forma* merely, we do not feel at liberty to give such an effect to the judgment. The judgment of the county court must be reversed, so that on another trial, the facts involved in the issue of this case, may be found.

MARSHALL ALEXANDER *v.* BANK OF RUTLAND.

Book Account. Agency.

The Bank of Rutland applied to one Burdick to get out a quantity of stone conformable to a model which he had furnished, (for the purpose of repairing the vault, of the said Bank,) and also to do the work. Burdick refused either to get the stone or do the work. They next inquired if he could not see to the getting out of the stone, and to the doing of the job. Burdick replied that he knew men whom he could employ to do the work, and that he would see to it as much as he could without neglecting his business on the Railroad. The Bank told him to go on, get out the stone, and do the job. Thereupon Burdick employed the plaintiff to do the work for the Bank; and upon these facts, it was *held*,— that Burdick was the agent of the Bank; that the account of plaintiff was properly charged to the Bank, and that they were liable to the plaintiff for the labor thus performed.

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BOOK ACCOUNT. The action was commenced before a justice of the peace, and came to the county court by appeal. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows:

The plaintiff was employed by one John M. Burdick, to quarry and get out of a certain ledge in Shrewsbury, a quantity of stone for the purpose of repairing the vault of the Rutland Bank, that the plaintiff performed the services, and incurred the expenses charged in his account. That the blocks of stone which were got out by plaintiff, were drawn and delivered near the banking house in Rutland, by certain other persons, who were employed by said Burdick, and that he employed some other persons to do some parts of the job of getting out stone for repairing said vault; that the cashier of the bank, by direction of its officers, had paid two or three bills to persons so employed, after said bills had been certified to be correct, by said Burdick. That the president and cashier of said Bank applied to said Burdick to make some alteration and repair upon the vault of said Bank; after some conversation between the parties, about the cost of the job, and a model of the size and form of the necessary blocks had been prepared or procured by said Burdick, the said president and cashier requested said Burdick to go on and do the job. Burdick replied that he was to work upon the Railroad, and could not do the job; he was then asked if he could see to getting out the stone, and the doing of the job; he replied that he knew of some men whom he could employ to do the work, and would see to it as much as he could without neglecting his business upon the Railroad; he was thereupon told by said president and cashier to go on, get out the stone, and do the work. Soon after, said Burdick employed the plaintiff to quarry said stone according to the model, and informed him for what purpose they were wanted, and told him when he got through to make out and present his bill for the work and it would be paid. The blocks of stone quarried as above stated by the plaintiff, have not been used in repairing said vault, and still remain near said banking house where they were left when drawn. The account of the plaintiff was examined, on the trial before the auditor, by said Burdick, and by him approved, as being correct and reasonable.

The county court, April term, 1851,—BENNETT, J., presiding,

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rendered judgment upon said report for the defendant. Exceptions by plaintiff.

S. Fullam and *C. H. Crosby* for plaintiff.

The report finds that the work was done for defendant at their request — that Burdick refused to do the work — and that defendant directed him to go on, hire men, and see to the job.

The law, in such cases, implies a contract to pay, unless it is controlled by a contract with some other person, which in this case is not found.

This is a mere case of *agency* and nothing else, and unless we recover of defendant, we must lose our work. Burdick is not liable to us. Paley on agency 139.

S. H. Hodges for defendant.

The only questions arising in this case, are questions of fact; and upon these, the decision below is final. If anything had been found affirmatively, which the evidence had no tendency to prove, the error might have been corrected here. In this instance the county court acted entirely in the negative, and merely declined to infer from the circumstances reported by the auditor, that there was a contract between these parties. Error cannot be predicated of this without determining upon the weight, as well as the bearing of the testimony, and pronouncing it conclusive upon the triers. *Birchard* v. *Palmer*, 18 Vt. 203. *Stone* v. *Foster*, 16 Vt. 546.

The opinion of the court was delivered by

Isham, J. It is admitted in this case, that the services were rendered, and expenditures made by the plaintiff, as allowed by the auditor. But the defendants claim that they are not accountable to the plaintiff; that they never employed him, and that no privity of contract exists between them. We learn from the case that the plaintiff was employed by one John M. Burdick, to perform these services, but it is insisted that Burdick acted as the agent of the Bank in so doing, and was authorized to employ him for that purpose, and whether he was such agent or not is the question in the case. If he was the agent of the Bank and employed the plaintiff as such, the account was properly charged to

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the Bank, otherwise the account should not have been so charged, and the defendants are not responsible in this action. The auditor in his report does not say expressly that he was agent, but has reported specially the facts in the case, which he has found from the testimony before him, and referred the question of agency, as a matter of law, to the decision of the court, and this he had a right to do. If he had neglected to decide and report the facts in the case, the report should have been recommitted, but questions of law he may refer to the court, and the court will dispose of the case as they would if the facts had been found by a special verdict of a jury,—indeed, the report of an auditor in that form, assumes the character of a special verdict. The finding of the auditor is equally as conclusive upon the facts as reported, and the law arising from those facts, is as much to be settled by the court in one case as the other. There is no complaint but that the facts are all found in the case, unless it be the want of an express statement whether he was agent or not. But this is a conclusion of law from the facts reported. If these facts had been found by a jury, or if they were contained in a letter or other writing, addressed to Burdick, its construction and effect, whether he was agent, and the extent of his powers as such, would have been for the court to have construed and decided, and it is equally so, when the facts are reported by an auditor. This effect was given to facts so found in the case of *Collins* v. *Emmett*, 1 H. Bla. Rep. 313. *Howard* v. *Bailey*, 2 H. Bla. Rep. 618. *Ward* v. *Shaw*, 9 Bing. Rep. 708. *Hogg* v. *Smith*, 1 Taunt. 347. Chitty on Cont. 214 note (d.) If this case was pending before a jury, and the fact of the employment of Burdick was disputed, or if the question arose whether one was a general agent, and it was to be found from the acts of the principal or inferred from a general employment, the case might involve questions proper for the consideration of a jury. But it would have been the duty of the court in such case, to have charged the jury upon the facts as they should find them, and direct them when the facts would constitute him an agent, and when not. 32 E. Com. Law Rep. 336. *Todd* v. *Robinson*, 1 Ry. & Moo. 217. *Gilman* v. *Robinson*, 1 Car. & Payne 642. *Eaton* v. *Bell*, 5 Barn. & Ald. 34. *Prescott* v. *Flinn*, 9 Bing. Rep. 19. So when the facts are ascertained by an auditor, or in any other way judicially, it then becomes the duty of the court to say, whether from

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these facts he was constituted the legal agent of the party, as much so as it was their duty in the other case, to give it in charge to the jury.

Regarding this question in that light we are led to see whether the facts reported by the auditor, authorized Burdick to employ the plaintiff to perform those services for the Bank. We find from the report that the Bank first applied to Burdick to get the stone conformable to a model which he had furnished, and also to do the work. Burdick refused either to get the stone or do the work, as he was at work upon the Railroad and could not do it. In this, it is evident that Burdick refused to place himself in the position of a contracting party in relation to that work. When therefore, they next inquired "if he could not see to the getting out the stone and doing the job" they could not have intended to have made a virtual renewal of that proposition which he had just declined, and when Burdick replied, "that he knew men whom he could employ to do the work and would see to it as much as he could without neglecting his business on the Railroad," he evidently did not suppose he was contracting a relation which he had just before refused to take upon himself. It could not have been so understood by either of the parties, and when the Bank told him to go on, get out the stone, and do the job, they could have expected only that he should employ these men for them, and give such oversight as he should be able, consistent with his other engagements. If the work on the road prevented him from ever going near the Bank or the work, they had no reason to complain, for he had made no engagement inconsistent therewith. The Bank desired him to employ the men, as better knowing those best qualified and competent for that purpose, and his obligation extended no further than to exercise his best judgment in that respect, and to extend that oversight over the work, that his engagements with the Railroad would permit. On these facts, can it be supposed that if the men had refused to do the work, or had done it in an unsuitable manner, Burdick would have been responsible. He would, if he is to be considered as a contracting party, and to say that he would be liable, would be placing him in a position which he had positively refused to take. He manifestly undertook simply to exercise his best judgment in employing men for them to do that work, and to see to the manner in which it was done, if his other engagements would allow.

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The plaintiff evidently had the same understanding at the time of his employment by Burdick. For Burdick informed him, that the Bank of Rutland wanted the work done, and the purposes and objects for which the stone were wanted, and directed him when he got through, to make out and present his bill and it would be paid. He did finish the work, and called upon the Bank for payment; the work, therefore, was not done upon the credit of Burdick, but of the Bank. Manifestly the whole case bears the impress of a contract made between this plaintiff and the Bank, through Burdick as their agent. 6 Wend. Rep. 475, *Lincoln* v. *Battle*. Evidently this plaintiff can sustain no action against Burdick for that work; for Burdick made known his principal, and took upon himself no personal obligation to pay him, as appears from the circumstance that the services were not rendered relying upon him for payment, but were charged to the Bank.

The law is well settled that "where an agent makes known his "principal, or where there are circumstances showing at the time, "that it was understood that he intended to make the contract on "behalf of his principal, the contract is entirely the principal's, and "the agent incurs no liability." "And where an act of the agent "will admit of more than one construction, the court will adopt "that which will bind the principal, and not that which will bind "the agent only." *Dyer* v. *Burham*, 25 Maine Rep. 13. Story on Agency, § 154. 2 Kent's Com. 631, 830. 22 Wend. Rep. 244.

The fact stated in the auditor's report, that other persons employed by Burdick in the same work, were paid by the Bank, exerts a very controling influence upon this question. Its effect might possibly have been lessened, if not destroyed, if it had appeared that the payment was made on the account of Burdick. But standing as it does, it is a direct ratification of Burdick's agency in making such employments, and of their obligation to pay those thus employed. *Boulton* v. *Arlsden*, 1 Salk. 234. Paley on Agency, 139. 32 Com. Law Rep. 338, by TENDAL, Ch. J.

We think, therefore, Mr. Burdick must be regarded as the agent of the Bank, and as having been empowered to employ the plaintiff to perform those services for them, for which this action is brought, and that the judgment of the county court must be re-

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versed, and judgment entered for the plaintiff for the amount specified in the auditor's report.

THE BRANDON IRON COMPANY *v.* ROLLA GLEASON.

Attaching Creditors. Subsequent Attaching Creditors. Liability of Officer. Corporations.

An attachment creates a *lien*, and places the property in the custody of the law to respond the judgment and execution that shall be obtained thereon; and as against subsequent attachments, the rendition of a judgment in due form and course of law, is as necessary as the attachment itself. So is also, the issuing of an execution on that judgment, and duly charging the property therewith.

And if several creditors attach the same property, and the first attaching creditor, (his claim being large enough to absorb all the property,) by an agreement with the debtor, takes all the property in satisfaction of his claim, and discontinues his suit; though by this agreement his title may be good as against the debtor; as against the subsequent attaching creditors, who perfect their *lien*, by judgment and execution, it will give no title to the property, and can have no effect, unless their assent was also obtained.

So, also, if the attaching officer permits the property to pass into the hands of the first attaching creditor in satisfaction of his debt, under such an agreement, the officer is not protected by this application of the property, and it is no legal accounting for the same, therefore he will be held liable to the subsequent attaching creditors who perfect their *lien;* the first attaching creditor having lost by the discontinuance of his suit, the *lien* created by his attachment, and by the agreement acquired no claim or title to the property, as against the officer or subsequent attaching creditors.

A Corporation will not lose its corporate existence by having ceased to do business after April, 1841, to February, 1852, and by disposing of their personal property, and neglecting to choose corporate officers in that time; and though a legal surrender may *be presumed*, where for a sufficient length of time, there has existed an entire *non user* of corporate franchises, and a neglect to choose corporate officers, still, the lapse of time required for that purpose has never been decided in this State.

The case *Munger* v. *Fletcher*, 2 Vt. 524, commented upon.

TRESPASS ON THE CASE, brought against the defendant Gleason, as Sheriff of the county of Chittenden, in two counts,

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for not keeping and delivering several articles of personal property, for thirty days after the rendition of judgment, to respond the said judgment, attached by him as such Sheriff, at the suit of the plaintiffs against one David French. The plaintiffs made no claim for the property which was sold on the execution of Wm. Randall, the surplus of which was paid over to plaintiffs on their execution.

Plea, general issue and trial by jury, April term, 1851,—BENNETT, J., presiding.

The following is the Officer's return upon the writ in favor of the *Brandon Iron Co.* v. *David French:*

STATE OF VERMONT, } FEBRUARY 22d, 1845.
Chittenden County, ss. } Then by virtue of this writ, and by direction of A. B. Maynard, Esq., agent for attorneys for plaintiffs, I attached as the property of the within named defendant, three horses, one stage wagon, one lumber wagon, one one-horse wagon, two cutters, one sleigh partly finished, one lumber sleigh, one one-horse wagon, one double harness, one concord wagon, and on the same day I delivered to the within named David French a true and attested copy of this writ, with a list of the property so attached, with this my return thereon indorsed. The above attachment, subject to an execution in my hands for collection, for about ninety dollars in favor of one Landon, also to one attachment in favor of Chauncey W. Conant.

(Signed)

ROLLA GLEASON, *Sheriff.*

The following is the officer's return upon the execution in favor of the *Brandon Iron Co.* v. *David French.*

STATE OF VERMONT, } MARCH 28, 1848.
Chittenden County, ss. } Then I repaired with this execution, to the usual place of abode of David French, the within named debtor, in Williston, and there demanded the damages and costs contained in this execution, with the legal interest thereon, with all legal charges for serving the same, and the said David French having refused and neglected to pay and satisfy said execution with costs of service, I seized by virtue of this execution, one stage wagon, the proper goods and chattels of the said David French, and on the same day I advertised at the Inn of David French, in Williston, that said wagon would be sold at public vendue at said French's Inn, on the 11th day of April, then next. And having safely kept said wagon, and the said David French

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having failed to redeem the same by otherwise satisfying this execution and the charges of the officer thereon, I, at said French's Inn, in Williston, on the 11th day of April aforesaid, sold at public vendue, said wagon to William H. French of Williston, the highest bidder for said wagon, for the sum of fifteen dollars, and the officer's costs and charges in proceeding thus far being the sum of four dollars and three cents, and the money arising from the sale of said wagon, amounting to the sum of fifteen dollars, deducting said officer's costs and charges therefrom, leaves to be indorsed on this execution from the proceeds of the sale of said wagon, the sum of ten dollars and ninety-seven cents. There having been attached on the original writ, upon which judgment has been obtained and this execution issued, one one-horse wagon, two cutters, one new sleigh partly finished, one lumber sleigh, one one-horse wagon, and one concord wagon, subject to an execution in favor of William Randall, and against David French, which execution was in my hands for collection, and having sold said property on said execution, there remained after satisfying the same, the sum of one dollar and twenty-six cents, in part satisfaction of this execution, which said sums of ten dollars and ninety-seven cents, and one dollar and twenty-six cents, I have paid over to the creditor within named, in part satisfaction of this execution, and I return this execution into the office of the clerk of the court from whence it issued, unsatisfied except as above.

(Signed) Attest,

ROLLA GLEASON, *Dep. Sheriff.*

STATE OF VERMONT, } APRIL 14, 1848.
Chittenden County, ss. } Then and at several other times, on diligent search throughout my precinct, I cannot find either any goods, chattels or estate of the within named David French whereon to make further service and levy of this execution, as therein required.

(Signed) Attest,

ROLLA GLEASON, *Dept. Sheriff.*

On trial, the averments in the declaration in reference to the writ, attachment, judgment and execution, in favor of the plaintiffs against David French were proved as alledged, except so far as modified by the returns of the defendant upon said writ and execution. The defendant, in addition to his returns, proved the prior attachment of the property in question, upon a writ in favor of Chauncey W. Conant against said David French, which was duly entered in court, in reference to which it appeared, that said French was indebted to said Conant, in a sum far exceeding the

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value of all the property attached, and that before any judgment was obtained, in either suit, the said French at the request of said Conant, turned out and said Conant received all the property which is attached and is not accounted for in the defendant's return upon the execution, (said Conant being fully aware of the existence of the Brandon Iron Co.'s suit,) in part satisfaction of the said Conant's claim against said French at its full value, and upon an agreement that his suit should be discharged or discontinued which was accordingly done. It appears that the plaintiffs were a corporation, and ceased to do active business after the first of April, 1841, at which time all of its personal property in possession was bought by the said Chauncey W. Conant,— that at this time the stockholders were three in number, John Conant, and his two sons, John A. Conant, and the said Chauncey W. Conant, all of Brandon, who owned the stock in nearly equal proportions, no corporate officers having been appointed since April, 1841. That at this time, and ever since, the stock was regarded of no value by the stockholders, the effects of the corporation not being in their estimation sufficient to pay its debts; that the said John, John A., and Chauncey W. Conant remained the stockholders till after the commencement of the suits against said French, and the turning out of the property attached by the said Chauncey, and the discontinuance of his suit. That previous to the closing of active business of the company, in 1841, the said John A. Conant acted as the general agent of said company; that during this time said Chauncey W. was an active participator and manager of certain departments of the business of the company, connected with the carrying on and management of their furnace, and the manufacture of iron in Brandon; but that after 1841, the said John A. Conant had the sole charge of collecting the demands and closing up the concerns of the corporation, and that it was by his direction that the suit against French was instituted, and that the arrangement by which the property attached was turned out to the said Chauncey W. Conant, was without his knowledge, or that of the plaintiffs, except so far as it may be considered as given by the said Chauncey W., as one of its stockholders.

The court intimated, that they should charge the jury that if the property thus attached was thus appropriated in part satisfaction of C. W. Conant's debt, honestly and at its fair value, that

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this was a sufficient accounting for the property thus appropriated and a bar to the plaintiffs' suit so far as that part of the property was concerned. The plaintiffs did not insist upon their claim to any other portion of the property attached, and the jury on the above instructions and charge of the court returned a verdict for the defendant, subject to exceptions. And to the above charge of the court the plaintiffs excepted.

C. L. Williams and *E. N. Briggs* for plaintiffs.

The only way in which the defendant endeavors to avoid his liability to the plaintiffs, is by showing that the property attached was regularly disposed of to satisfy a prior lien in favor of Chauncey W. Conant.

This lien, we insist, was lost by the discontinuance of said Conant's suit. *Hall, admr.* v. *Walbridge*, 2 Aiken 215. *Murray et al.* v. *Eldridge*, 2 Vt. 388.

If a formal confession of judgment as in the case of *Hall* v. *Walbridge*, or a regular adjudication upon the question of the defendant's indebtedness but upon an earlier day than the return day of the writ, as in the case of *Murray* v. *Eldridge* (upon which confession and judgment the property attached was formally disposed of) would operate to discharge a lien created by an attachment, much more would a simple turning out and receiving of the property in discharge of the debt have such an effect.

The fact that French was indebted to C. W. Conant and that the property was "appropriated in part satisfaction of C. W. Conant's debt honestly and at its full value," can make no difference with the plaintiffs rights. The same might have been said in reference to the disposition of the property in the cases above cited from 2 Aiken and 2d Vt.

The difficulty is, the property was not *legally* disposed of, so far as the plaintiffs' rights to it were concerned.

By the plaintiffs' attachment, the property was taken from the control of those previously interested in it and placed in the custody of the law, or of the defendant as its officer, to await the determination of the plaintiffs' suit, and while this was its situation the defendant could permit no disposition of it, except such as the law provided, without rendering himself liable.

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A. B. Maynard and *E. J. Phelps* for defendant.

1. The application of the attached property in good faith in satisfaction of the prior attachment, is an answer to this action against the sheriff, inasmuch as the amount of the prior attachment far exceeded the whole value of the property. *Munger* v. *Fletcher*, 2 Vt. 524.

2. The assent of Chauncey W. Conant to the arrangement, was under the circumstances binding upon the other two stockholders and a justification to the defendant.

Though originally a corporation, for more than four years previous to this transaction the corporate rights of the company had lapsed and been virtually surrendered. During this period they had neither organization, corporate officers, business or property. Their stock was nominal and worthless, and held by only three stockholders, John, John A., and Chauncey W. Conant. Under these circumstances, though they must of course sue, in the corporate name, on demands accrued to the corporation when in existence, they had no other corporate rights. They stood as three partners or joint creditors, and the act of one, (in the absence of the collusion) bound the others. Ang. & Ames on Corp., Chap. 21, Sec. 4. *Slee* v. *Bloom et al.*, 19 Johns. 456. 2 Kent Com. 250. *Penniman* v. *Briggs*, 1 Hopkins Ch. 300. *Penfield et al.* v. *Skinner*, 11 Vt. 296. 8 Cowen 387.

Especially would this be true of the act of Chauncey W. Conant who bought in the sole remains of the "institution" at the time its concerns were wound up, and was from that time the only person really in interest.

3. The court will not reverse a judgment to enable a plaintiff to recover nominal damages, especially where upon common law principles he ought not to recover costs. *Bullock* v. *Beach et al.*, 3 Vt. 73.

The opinion of the court was delivered by

ISHAM, J. This is an action on the case against the defendant as sheriff of Chittenden county, for not keeping and delivering certain articles of personal property attached by him as such sheriff, at the suit of the plaintiffs against David French.

The case shows the disposition of all the property attached. No claim is made for that part of the property which was sold on

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the execution of Wm. Randall, the surplus of which was paid over to the plaintiffs on their execution. But they claim to have all the property embraced in the officer's return applied on their execution which was not disposed of on the execution of Wm. Randall.

In relation to this property, we learn, that previous to the plaintiffs' attachment, it had been attached at the suit of C. W. Conant, and which had priority of lien over the attachment of the plaintiffs, and that his claim exceeded in value all the property attached. We learn also, that after these several attachments were made, Mr. Conant, by an arrangement with Mr. French, received all the property included in the officer's return and which has not been otherwise properly accounted for, at its full value, and which was applied in part satisfaction of his claim and attachment against French, and under an agreement which was carried into effect, that the attachment and suit of Conant should be discharged and discontinued. It is under this arrangement and application of this property on his debt, that Mr. Conant claims title to this property not only as against Mr. French, but also as against the plaintiffs as subsequent attaching creditors, and the defendant also relies upon this agreement and appropriation, as legally accounting for the property by him attached. And if by this agreement Mr. Conant has perfected a legal title to this property, it is evident that the property attached by the defendant has all been accounted for, and he is not liable in this suit. But if that arrangement was insufficient to convey such title, or if his lien by virtue of his attachment is lost, by a discharge and discontinuance of the suit, then the defendant is responsible in this suit for the property received by Mr. Conant and appropriated on his debt.

In the case of *Hall* v. *Walbridge*, 2 Aik. Rep. 215, it was held that successive liens by attachment, and in favor of different creditors could be created on the same property. The same principle was recognized in the case of *Murray* v. *Eldrige*, 2 Vt. Rep. 388, and in relation to the rights of subsequent attaching creditors where their proceedings to judgment and execution have been regularly taken, the court use this language: "that they have "thereby established their right not only to the surplus of said "property, after the plaintiffs' lien should be satisfied, but to the

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"whole of the property if the lien of the prior attaching creditors "should not be perfected."

No practical inconvenience has been found to follow from this rule, and we entertain no doubt as to its correctness to the extent to which it has been carried by the former decisions of this court. The question in this case is therefore narrowed down to the simple inquiry, whether Mr. Conant has so perfected his title under his attachment and agreement with French, as to give him a good right to this property as against the plaintiffs. The statute has been uniform in relation to the rights of attaching creditors and the steps necessary to be taken to perfect their right to the property attached. The attachment creates a lien, and places the property in the custody of the law to respond the judgment and execution that shall be obtained thereon. As against subsequent attachments, the rendition of a judgment in due form and course of law is as necessary as the attachment itself. So is also the issuing of an execution on that judgment and duly charging the property therewith. And as these proceedings are *in invitum* there should be a general and substantial compliance, at least, with all the requirements of the statute. Upon this principle it was held in the case of *Hall* v. *Walbridge*, that a confession of judgment in a suit, before the act allowing the same, would discharge a lien created by the attachment, as no judgment had been rendered *upon the process*, on which the attachment was made, and the property was held by the subsequent attaching creditors. So also in the case of *Murray* v. *Eldridge* a judgment was rendered by the agreement of the parties, a few days before the time specified in the writ, and its effect was to discharge the lien created by the attachment, and the property was held by subsequent attachments. In that case the court say, "the moment in which "the action was discontinued, or a judgment obtained by confes- "sion, or in any other way not in the regular prosecution of the "action, the lien of the subsequent attaching creditors was per- "fected to the whole of the property, the property ceased to "be holden by the first attachment." These decisions must be decisive upon the question arising in this case, for if the application of the property upon the debt in those cases, under a judgment and sale on the execution superadded to the assent and agreement of the parties was ineffectual to perfect the creditor's

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title, much less, as in this case, will such an application have that effect, under the simple agreement of the original debtor.

The case of *Munger* v. *Fletcher*, 2 Vt. Rep. 524, has been urged by the defendants as sustaining the right of Mr. Conant to this property under his agreement with Mr. French. In that case the property of one Fisk was attached at the suit of six different creditors, and under an arrangement with Fisk and the five first attaching creditors, the property was sold, against the consent of the last creditor, and the avails of the sale held by the officer to respond the judgment and executions that should be obtained. All the creditors perfected their lien and attachment by obtaining judgment, issuing executions thereon, and duly charging the property therewith. The last attaching creditor brought his suit and claimed that the lien of the other creditors was lost, and that the property was subject to his attachment alone. The court held that as the avails of the sale were not sufficient to pay the first attachment, the action could not be sustained, and that the claim of the different creditors were not lost by that arrangement and sale. It is to be observed that in that case all the creditors perfected their respective attachments by proceeding to judgment, issuing executions and charging the property attached thereon, and it is upon this ground that the court placed their decision. If the officer had neglected to account for the property or its avails and the several creditors had prosecuted him therefor, the first attaching creditor would have recovered the whole, as the avails of the sale were not sufficient to pay his debt. The last creditor, therefore, having sustained no damage, could sustain no action, and the officer having paid the avails of the sale to the first creditor, he had applied the property as it would have been recovered of him. But in this case, if Mr. Conant retains the property, it is applied in a different manner from what it could be recovered.

Mr. Conant by discontinuing his suit and neglecting to prosecute to judgment, can sustain no action against the sheriff for the property attached, as he has no lien thereon for that purpose. The plaintiffs are the only attaching creditors who have perfected their lien by judgment and execution, and they alone can sustain their action against the officer therefor. Upon the principle and authority of that case, even the attaching creditors must perfect

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their lien under their attachment, so that the officer can apply the property on those debts secured by attachment and satisfy the claims of those who have a right to call upon him for it. As Mr. Conant had no such right, the defendant is not protected by his claim or lien, in permitting the property to pass into his hands.

As against Mr. French the title of C. W. Conant may be good, as by his agreement he will be estopped to deny Conant's title. But this can have no effect as against the plaintiffs, unless their assent was also obtained. The fact that Mr. Conant was a stockholder in the Brandon Iron Company at the time of his arrangement with French, can furnish no evidence of such assent, for he at that time was in interest adverse to that of the corporation, in no way its representative, or acting as the agent of the corporation. On the contrary, after 1841 the general agency and charge of the debts of the corporation was placed in the hands of John A. Conant, and he alone could act as agent in its behalf.

It has been urged that the plaintiffs have lost their corporate existence by having ceased to do business after April, 1841, and by disposing of their personal property and neglecting to choose corporate officers since that period, and that in consequence of it the stockholders stood in relation to the concerns of that company as partners, which rendered the act of C. W. Conant in making that arrangement binding upon all.

We are not prepared to say, even if that relation existed, that the act of C. W. Conant, situated as he was, would have that effect upon the others interested; much less are we authorized to say, from any fact appearing in the case, that the plaintiffs have lost their corporate existence, or are incapable of exercising their corporate franchises. That they had a charter, and a legal corporate existence under that charter, and were duly organized, has not been put in issue by plea in abatement, or in bar. 11 Vt. Rep. 393, *Bank* v. *Allen*.

And where a charter has been granted and an organization effected under it, the question whether there has been a forfeiture of that charter, or a surrender of its franchises, cannot be tried, so as to be conclusive upon the corporation, in this collateral or incidental manner. On the question of forfeiture, it can only be tried by the writ of *scire facias* or *quo warranto* in direct proceedings between the corporation and the State granting the charter;

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and until judicially determined there has been no forfeiture, although a cause therefor may exist. *State* v. *Essex Bank*, 8 Vt. Rep. 489. 7 Conn. Rep. 45. 15 Pick. Rep. 351. 5 Mass. Rep. 230. 5 John Ch. 366. Ang. & Ames on Corpt. 664. So, to constitute a legal surrender of a charter, there must be an act of the corporation to that effect, and an acceptance of the same by the government granting the charter. In England it is effected by deed to the King, which must be enrolled. 1 Salk. 192. 2 Kyd. on Corpt. 465. In this country by acceptance, and the authorities are uniform, that it is of no avail until accepted. 2 Kent's Com. 358, last ed. Ang. & Ames on Corpt. 658. 24 Pick. Rep. 49. 15 Pick. Rep. 351. 7 Conn. Rep. 45. This doctrine is fully recognized in New York, though they have found the necessity of qualifying the rule in relation to those charters where, in a certain event the individual stockholders are made personally liable—*where, for the sake of the remedy and in favor of creditors*, they will presume a virtual surrender. 2 Kent Com. 358. 1 Hop. 300. 8 Conn. 387. Aside from that particular purpose, Chancellor Kent remarks that "The old and well established principle of law remains good as a general rule, that a corporation is not to be deemed dissolved by reason of any misuser or nonuser of its franchises, until the default has been judicially ascertained and declared." 2 Kents Com. 359. 4 Paige Ch. Rep. 481, *Wilde* v. *Jenkins*. It is probably true that a legal surrender may *be presumed* where, for a sufficient length of time, there has existed an entire nonuser of corporate franchises, and a neglect to choose corporate officers. Such has been the general received doctrine in this State, and was recognized in *Penfield* v. *Skinner*, 11 Vt. Rep. 296. But the lapse of time required for that purpose has never been decided. In *Slee* v. *Brown*, 5 Johns. 399, it was held that two years would have no such effect. So, also, in *Russell* v. *McLeland*, 14 Pick. 63. A nonuser for ten years was held not to work a forfeiture, or loss of corporate franchises, 7 Conn. Rep. 47. In *Regina* v. *Ballvas*, 1 P. Wm.'s 207, it was held by PARKER, Ch. J., that after twenty-two years, a vacancy in an office under the charter could not be filled, though POWELL, J., dissented, and thought an election might be made on a charter day. It is upon the ground alone, of a presumed surrender of the charter, that evidence of nonuser of corporate fran-

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chises can be received. This case does not require a more definite determination as to the length of time necessary to raise such presumption; as no doubt is entertained that there has not been such a neglect by this corporation, in the use of their corporate franchises, as will operate as a dissolution of its charter.

The plaintiffs therefore, having still their legal existence, and not having assented to the arrangement of C. W. Conant with Mr. French, cannot be concluded by that arrangement, and the defendant must be held responsible for not keeping and delivering up on demand, the property for which this action was brought.

The judgment of the county court must therefore be reversed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF BENNINGTON,

FEBRUARY TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

LUTHER LOOMIS *v.* BENJAMIN F. FAY AND LYMAN PATCHIN.

[IN CHANCERY.]

The opinion was delivered at Rutland, Circuit term, July, 1852.

Chancery. The Answer. Fraud.

When the defendant is not supposed to possess personal knowledge in regard to the facts set forth in the bill, and in his answer does not profess any, the answer is not to be taken as evidence of the truth of its denial, and therefore, required to be overcome by something more than the testimony of one witness. In such cases it leaves the matter of facts, upon the proofs in the case.

The surrender of a fictitious or forged bond, held by the creditor, for the benefit of the surety, where the same was of no possible use to the surety, except, as a matter *in terrorem*, is nothing for which a court of equity will decree an exoneration of the surety.

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An indorsement made to a bank under an express written agreement from the president, that the indorser should never be holden upon the indorsement, would be inoperative, as a fraud upon the bank; and a parol agreement, to that effect, could not be received to contradict or explain the indorsement, unless to show fraud in the indorser.

And even if the fact was fully established in a court of equity, it would still impose upon the indorser, the obligation to refund to an innocent purchaser of the note, whatever sum he should be induced to pay out in faith of the indorsement, which was apparently valid and binding. *Quere*, As to how far notice to defendants, of a defense claimed before purchase, will deprive them of this equity.

REDFIELD, J. Cases of this kind should be *tried* in the court of chancery before they are brought into this court, &c.

APPEAL from the court of chancery. The facts of the case sufficiently appear in the opinion of the court.

D. Roberts, Jr., for orator.

P. Isham and *J. S. Robinson* for defendants.

The opinion of the court was delivered by

REDFIELD, J. This bill is brought to compel the defendants to deliver up to be cancelled, or perpetually be enjoined from sueing the plaintiff upon certain notes indorsed by the orator, to the Bank of Bennington, (and which were purchased by the defendants of the receiver of that Bank,) on the ground of fraud in the Bank, in obtaining them, and failure to perform the stipulations and conditions upon which they were obtained, and also the improper surrender of other collateral securities.

It is first alledged, that in the month of October, 1840, at the city of New York, S. C. Raymond, the president of the Bank of Bennington, agreed to loan to George C. Knight, of the same city, eleven thousand dollars. That the loan was made to Knight upon certain promissory notes, bills and drafts, drawn by various persons for various sums, a schedule of which is set forth. It is also alledged, that Knight gave his own note for the amount of the loan, and also a bond signed by "L. Loomis and others," for $15,000, as security.

After this loan, and before payment or the surrendering of any of the securities, Knight applied to that Bank, for an additional loan of twenty thousand dollars, which Raymond agreed to make

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upon having an additional bond for ten thousand dollars. Raymond's letter stating the conditions of the loan in detail, is set forth in the bill; upon this second contract it is alledged, the bank made sundry advances, but to what amount is not alledged.

And on the 13th day of March, 1841, Raymond co-operating with said George C. Knight and one Palmer Cleaveland, to injure, defraud and deceive the orator, proposed to said Cleaveland to procure the orator's indorsement to secure the Bank of Bennington for Knight's indebtedness to them. And the three applied to the orator and requested him to indorse three promissory notes to the Bank of Bennington, amounting to fourteen thousand dollars, and to induce him to make the indorsement, represented to the orator, that the Bank held the securities before named, and which they concurred in declaring to your orator were sufficient to protect him in his indorsement. And, therefore, he indorsed the notes drawn by Cleaveland, payable to the orator, and they passed into the hands of the Bank. And it was agreed at the time of the indorsement, that the orator should not be called upon to pay the notes, but they should be met by the arrangement hereinafter set forth, between Raymond, Knight and Cleaveland. This was done without any consideration, benefit or advantage to the orator, and so understood by Raymond at the time.

The contract made at the time, between Knight, Cleaveland and Raymond, is set forth in the bill, *in haec verba*. By this it would seem that in consideration of receiving Loomis' notes or security for $14,000 of Knight's indebtedness to the Bank, Raymond agreed to loan $5,000, every thirty days, to the mining company, on condition that Cleaveland's notes, indorsed by orator, should be paid promptly, at maturity. The indorsement of $14,000 by Loomis, is denominated in this contract, "as satisfactory security for the sum of $14,000, for and on account of the liabilities of said George C. Knight to the said Bank of Bennington."

This contract was at the same time assigned by Cleaveland to the orator, as collateral security for his indorsements. The payments under this contract were, by the terms of the assignment, to go to the orator, if Cleaveland did not meet the notes indorsed by the orator, at maturity, until the orator should be fully indemnified, but if Cleaveland met these notes then the assignment was to have no effect.

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Raymond also gave Knight a receipt for the notes indorsed by the orator, the obligation of which was "to place them to the credit of Knight when collected."

The orator alledges that the Bank did not perform this contract on their part, in that they refused to make the loan as stipulated. [The loans were, by express condition, made to depend upon the payment of Cleaveland's notes being paid at maturity.]

The orator further alledges, that before he made the indorsement for security of Knight's indebtedness to the Bank of Bennington, they had in addition to the securities above named, $15,000 of bills of the Citizen's Bank, Augusta, Maine, and also a large amount of notes, bills and checks, a list of which is set forth in the bill. And subsequently, and without the knowledge of the orator, Raymond, (on behalf of the Bank,) entered into a secret agreement with Knight, by which a portion of the securities were surrendered up to him, and the principal portion, upon which the orator chiefly relied for his indemnity, and which Raymond represented as being ample, at the time the orator made the indorsement. And on that occasion, the said Raymond gave said Knight a writing agreeing to surrender all collateral securities held by the Bank, upon being secured $7,000 in William Matson's note, and also the notes of Palmer Cleaveland indorsed by the orator, and remaining unpaid to the amount of $9,000, and also the note of the mining company for $5,000. This agreement was made on the 23d of June, 1841.

In pursuance of this agreement most of the other securities were surrendered, and Knight and Cleaveland have become altogether insolvent; orator has requested the Bank to give up the notes indorsed by him to be cancelled, which they decline to do. On the fifteenth day of November, 1841, the Bank of Bennington failed and became insolvent, and by the order of the chancellor, their effects went into the hands of a receiver, and two of the notes indorsed by the orator, went into the hands of the receiver, and on the 12th day of November, 1845, were sold at public auction, to the defendants, for a small sum, but how much the orator is not informed.

The defendant Fay has sued the $4,000 note, in Bennington County, by summoning Lyman Atwater as trustee.

Prayer — For perpetual injunction against collecting, or negotiating either of said notes.

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We have thus given a minute synopsis of the entire bill. The defendants are not supposed to possess any personal knowledge in regard to the facts, and in their answer do not profess any. They deny substantially all the allegations in the bill, from which any liability could fairly be deduced.

We are not inclined to regard the answer under such circumstances, as evidence of the truth of its denial, and therefore required to be overcome by something more than the testimony of one witness. It merely leaves the matter of fact upon the other proofs in the case.

The first charge against the Bank of Bennington, is the loan of eleven thousand dollars, and taking security by way of a bond of fifteen thousand dollars, and then surrendering the bond after obtaining the indorsement for $14,000, as collateral security for this sum. This, it is attempted to be inferred, was done by a secret arrangement between Knight and Raymond, without the knowledge of the plaintiff.

The great defect in this charge and in the proof is, that this bond was, as to the only name relied upon, a fictitious security, a mere fraud, and as to all the other signers, wholly worthless. The proof is abundant, and wholly uncontradicted, upon this point. In this part of the transaction, the Bank of Bennington, through Raymond, seem to have been made the victims of one of the most bare-faced frauds ever perpetrated. And one cannot help fearing that Knight must have had accomplices, and how many and whom, it is easy to conjecture, but difficult to know.

This bond was of no possible use to Knight's sureties except, as a matter *in terrorem*, and the surrender of such a right by the creditor, is nothing for which a court of equity, will decree an exoneration of the sureties. And it is not very satisfactorily proved that Raymond consented to the surrender of this bond, such as it was. It is probable, that Mitchell connived at Knight's taking it, but Raymond expressly denies any such agreement or expectation on his part.

The charge in the bill, in regard to the twenty thousand dollar loan, may be dismissed by saying it was never carried into effect. All the proof upon this point, renders that absolutely certain.

There remains then, the contract of the 13th of March, 1841, by which the plaintiff's indorsement of Palmer Cleaveland's notes

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for $14,000 was obtained. In regard to this, it is charged first, that the indorsement was fraudulently obtained by a virtual conspiracy between Raymond, Cleaveland and Knight. And secondly, that the securities upon which the plaintiff was induced to rely at the time of making his indorsement, and which it was represented to him were ample, were surrendered to Knight without the plaintiff's knowledge, and in fraud of his rights. It is also claimed, that the consideration for the indorsement on the part of the Bank was not performed by them or by Raymond.

In regard to the first point, the orator relies upon the testimony of Knight, Thaddeus Spencer, George A. Loomis, and others. But it does not seem to us, that it can fairly be said that there is any proof of any fraud practiced upon the plaintiff, in obtaining his indorsement; or at all events, that Raymond participated in any such fraud. There is no proof whatever, that Raymond ever made any representations himself to plaintiff, or that he ever made any specific representations to others, which he authorized them to communicate to plaintiff, or that any such were made to the plaintiff, as coming from Raymond, which he did rely upon; nor is there anything in the case, to show that Raymond ever made any assertion as to safety of plaintiff, in making such indorsements, which he did not believe at the time to be true.

But there are some obvious features about the transaction which tend very fully to satisfy us, that the plaintiff made no reliance at the time, upon any representations of Raymond.

1. He knew, and all knew, that Raymond stood in an antagonist attitude to Knight, and Cleaveland, and plaintiff; Raymond was endeavoring to get security for Knight's former indebtedness to the Bank of Bennington. And he stood alone almost, except his son was present, for some purpose, and whether to aid his father or help himself is not certain.

2. Knight was, and always remained, to the time of giving his testimony, the tried and confidential friend of the plaintiff. Spencer says *he* (Knight,) first proposed getting the plaintiff's indorsement. And although Spencer says, Raymond joined with the others in giving assurances of the perfect safety of Judge Loomis in indorsing, and others testify that it was never expected Judge Loomis would pay these indorsements, Knight does not so represent the matter. He says expressly, that plaintiff was induced to make

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the indorsements, at the request of Cleaveland, Spencer and himself, not naming Raymond. And the reason he assigns, for their uniting in this effort is, that they were all interested in the Lead Company, and that is no doubt the true reason.

And Knight, when asked by whom it was expected these notes would be paid if Cleaveland failed to pay them, said he did not know, "But I supposed Luther Loomis would be called upon to pay them," which is certainly a very obvious inference under the circumstances. Now it is undeniable, that this witness, with all his sins upon him, and they seem to be manifold, has stated the plain unvarnished truth about this transaction. It is corroborated by all the circumstances in the case, and by all the other testimony in the case that is reliable or credible.

It is impossible for any sensible man to believe George A. Loomis' testimony, as to the admission of Raymond, at the time he was giving his testimony to be used in this case, almost *in extremis*, and still admitting to the son of the plaintiff, that his entire testimony was but a tissue of falsehood.

3. It is obvious to me that the real motive on the part of Knight, Cleaveland, Spencer, and Luther Loomis, in procuring, and in giving this indorsement, was to raise the credit of the Lead Company stock. They were all deeply, and one might almost say desperately involved, directly and indirectly, as owner and holders of this stock. While Raymond, at that time had little or no interest in this stock; his son had some at the time, and it is not improbable he might then have entertained purposes of adventuring in it more or less thereafter. But his chief object seems to have been to put his money and that of the Bank, to good use and keep it safe. The only wonder is, that he could, (after being cheated as he had, by Knight and others,) have made the slightest reliance upon their professions.

I have no apprehension, that the plaintiff, or Knight, or Raymond, perhaps, expected at the time, that plaintiff would be called upon to pay the note he then indorsed. That is never expected when a surety signs a note. But to say that from such an expectation is to be extorted the agreement that his indorsement should not impose any obligation, is certainly a very liberal interpretation of reasonable expectation. The truth is, he did know and must have known, that he would be holden to the Bank, as

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Knight says, and as plaintiff told Raymond in the presence of Weed, upon the failure of Cleaveland to pay. An express written agreement, that he should not be holden, would have been inoperative as a fraud upon the Bank, and a parol agreement to that effect could not have been made to contradict or explain the indorsement, unless to show fraud in the indorsee.

4. It is obvious to us, that Loomis, in endorsing Cleaveland's notes, at the time relied a good deal upon the contract of Raymond, which was then assigned to him as his security, so that he could obtain the $5,000 payments to reimburse himself. But he must have seen by the very writing itself, that one of these contracts was not dependent upon the other. His endorsements were expressly stipulated in the contract as satisfactory security to the Bank of Bennington for that amount of Knight's indebtedness to them. But the promised loan to the Lead Company was made dependent upon two conditions, the payment of Loomis' endorsements, and also the notes upon which the advances were made to the Lead Company, and these payments were expressly stipulated to be made promptly, or Raymond should not be bound to make further loans to the Lead Company. Now as Loomis in my belief made a chief reliance upon this contract, as the inducement or security to him for making the indorsement, if Raymond had essentially failed in performing on his part, I might think it reasonable that plaintiff should be exonerated.

But it seems to us, that the failure was altogether on the part of Cleaveland and Loomis, and in the very point which it was expressly stipulated should excuse Raymond from making further advances to the Lead Company.

A great deal more might be said to show that Raymond practiced no fraud in obtaining the notes indorsed by plaintiff, and that there was no binding stipulation that the indorsements should not be obligatory, and no such failure to perform on the part of Raymond as will exonerate Loomis from the obligation incurred by his indorsement, but it is needless. All the circumstances and most of the express testimony upon both sides tends altogether in that direction, and whatever is of an opposite tendency is so slight, or attended with such marks of doubt or distrust, as not to shake at all our perfect confidence in the general current of the testimony upon this point.

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After this, evidently, Brown and Houghton had no title to this property that should prevail against the right of the Bishops as general owners, or their attaching creditors—for having paid nothing they could not claim as purchasers—as trustees, or as having a special interest, they could claim nothing, as the whole object of the conveyance to them had been answered, and it appears they so considered it, for it is stated in the exceptions, that from the time of the payment of those claims in 1839 and '40, both Brown and Houghton "ceased to have any further control "or direction of the factory or machinery, but left the whole to the "care and custody of the Bishops." Under these circumstances, the property was attached by this creditor as the property of the Bishops.

Brown and Houghton have no reason to complain, and we do not understand, that it is claimed, that they have a title that should prevail against this attachment. And there can be no propriety in Bailey and Amidon setting up a title under their deed against this attachment contrary to its positive and unqualified provisions.

But it is insisted, that after Brown and Houghton ceased to have a claim to this property under their deed, they stood in the relation of trustees to Bailey and Amidon, and that it was their duty to have returned or reconveyed the property to them, to be held under their original deeds, as security for the payment of the balance of their claims against the Bishops, and that this property became so reinvested by operation of law. On this part of the case, the defense seems to be narrowed down to that single inquiry.

The exceptions which have been allowed in the case do not state any such *express agreement* to have been made between Bailey and Amidon and Brown and Houghton, not even a parol understanding to that effect is found to exist in the case. And if so important a circumstance existed, it should have been affirmatively found and stated. But on the contrary the deed would seem to forbid the existence of any such agreement, for instead of its containing any provisions or reservations of that character, it is an absolute transfer of all their right and title to this property to Brown and Houghton. Had this deed contained any provisions of that character, if any expressions had been used or contract

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stated showing that to have been the intention of the parties, the question would be very different from what it now is. Without some circumstances showing that such relation was intended by the parties, or some contract made, it cannot be so considered, for the law will not create that relation, or impose such duty by implication against the express provisions of the deed, and particularly against the right of attaching creditors. 2 Story Eq. 1195. 6 Conn. Rep. 287, *Dean* v. *Dean*. 6 Barb. Rep. 482, *Watson* v. *Le Roy*.

It is rather to be implied and presumed, that Bailey and Amidon having in reality but a special interest in the property, intended to discharge and release that interest for the benefit of the Bishops, the general owners of the property, and that when the trust was discharged for which it was conveyed by them to Brown and Houghton, the property was to be held and placed (as it was in part) under the control and use of the Bishops, in the exercise of their powers as general owners. And when the property is attached by this creditor under such circumstances, it is not only a matter of law but of equity, that those persons who had but a special interest at most in the property should be estopped by their deed from setting up that interest, which by an instrument so formal and solemnly executed, they have released and discharged.

On this part of the case, therefore, we think the verdict was correctly rendered. And though on the trial the court may have charged the jury on other questions, some of which may be considered doubtful, or even if there was error, yet if from the whole case it clearly appears, that on another trial a similar verdict must inevitably be rendered, a new trial will not be granted. 1 Aik. Rep. 43. Bray. Rep. 168–9. 17 Vt. Rep. 499. 19 Vt. Rep. 210.

A further inquiry remains, whether the claim against the town is discharged by an agreement of the plaintiff in relation to the manner in which payment was to be made for the property sold. We learn from the case that previous to the sale there was an arrangement made between Dennison & Gore, Joel and Jonathan Houghton, and the plaintiff, that Dennison & Gore through Joel Houghton were to become the purchasers of this property at the sale, and were to pay Jona. Houghton, and that Jona. Houghton

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was to pay the plaintiff the amount by applying it on claims he had against him. On the day of sale, however, the plaintiff and his attorney were present, *and the constable was then directed to sell the machinery according to the statute and for cash.* In these directions the duty of the officer was distinctly pointed out. He had no authority to sell on credit or for anything but money. With the former conversation or arrangement between the parties, he had nothing to do. The sale was made under these instructions, and when completed, the officer, and on his neglect the town, was responsible to the plaintiff for the amount of the sale.

But after the sale and purchase by Houghton for Dennison & Gore, it appears that Houghton informed the plaintiff, that if he had rather have the money than have it applied as previously arranged, it would be got for him. That the plaintiff replied that he was willing to have it applied in that way, and consented to have it postponed until Gore should come to Readsboro. If the town is absolved from their liability for the officer, it must arise from this subsequent arrangement, and the propriety of the verdict must depend upon the finding of the jury, as to the understanding of the parties in that *arrangement and postponement*, and the charge of the court in relation to it. It is to be borne in mind, that as soon as the sale was made, the liability of the officer was fixed, and on his neglect the liability of the town. And whether the plaintiff by any act has discharged that liability was the question which the court were called upon to instruct the jury, and which now arises on this bill of exceptions. The court charged the jury, that if the plaintiff after the sale was offered payment of his execution and refused to receive it, or agreed that the officer might give credit to the purchaser for any length of time, the town would not be liable. These questions of fact were properly submitted to the jury, and if true the verdict should have been for the defendant. The jury in returning a verdict for the plaintiff have found that no such facts existed, that the plaintiff was never offered the money and refused it, and that he never agreed that the officer might give credit to the purchaser.

It was a mere consent to delay enforcing his claim against the officer or the town, leaving the matter with the officer to enforce payment of the execution, by that arrangement or otherwise, at his own discretion. This was the understanding of the parties in that arrangement as found by the jury, and with which we have no

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right to interfere, and it cannot but impress the mind with the conviction, that it is the only view of the subject in any way consistent with the positive instructions given at the sale.

The court further instructed the jury, that if the plaintiff agreed with the officer, that he would look to the Houghtons or any other person for payment, and would not rely upon the officer for it, or if the officer was induced by the acts or directions of the plaintiff to delay or omit the execution of the process, the town would not be liable. The verdict of the jury should have been for the defendant, if those facts were true. But the verdict being for the plaintiff the jury have found that no agreement was ever made to look to any other person but the officer for payment, and that the officer was not induced to delay or omit the execution of the process by any act or declaration of the plaintiff. This finding of the jury must be conclusive in this case upon those facts, and it is not for this court to presume that the jury have neglected to conform to the instructions given, or misapprehended their legal effect. It is only to the facts as found by the jury, and the instructions given by the court, that our attention can be directed.

The substance of that whole arrangement as found by the jury, and as stated in the case, is simply this; that the plaintiff so far as he was concerned, consented to let his claim lie as it was, having for his security the liability of the officer and the town, until Gore should come to Readsboro and perfect that arrangement, leaving the matter with the officer to act upon his own discretion whether to delay enforcing the payment of the execution before that period or not. This consent was nothing more than a suspension of his legal right to enforce immediate payment by the officer or the town. This is the finding of the jury as to the understanding of the parties in that arrangement. The instructions of the court upon that subject are unexceptionable. That the plaintiff was not obliged to insist on immediate payment of the execution, and that having directed the property to be sold for money before the sale, it was the duty of the officer so to do, and if the officer sold otherwise and on credit the town was responsible. The jury have found by their verdict that no credit was given by the plaintiff but that the delay was granted solely upon the responsibility of the officer.

The result is that the judgment of the county court must be affirmed.

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La Fayette Lyon v. Enos Adams.

Book Account. Nonsuit. Practice.

The plaintiff in an action on *book account* is not at liberty to become *nonsuit* after judgment to account, and after the case goes before the auditor.

Book Account. Judgment to account was rendered in the county court, and auditors were appointed.

June term, A. D. 1851, of the county court, on the first day of the term, the plaintiff entered on the docket of the court a *nonsuit;* and afterwards on the same day the defendant filed the report of the auditors. The plaintiff claimed the right of entering a *nonsuit* in the case; to which the defendant objected, and claimed judgment on the report of the auditors. Whereupon the county court,— Pierpoint, J., presiding,— rendered judgment on the report for the defendant, and that plaintiff has not the right to enter a *nonsuit*. Exceptions by plaintiff.

The above presents the only question arising in the case.

Robinson & Sibley for plaintiff.

Nonsuits are of two kinds, voluntary and involuntary. Voluntary, when there is an abandonment of the cause by plaintiff and judgment against him for costs. Involuntary, when the court order such judgment to be entered. 2 Kinnie's L. Comp. 281.

Nonsuits of the latter kind are ordered in many States, but never are allowed in this State against the will of the party. *French* v. *Smith et al.*, 4 Vt. 363. Arch. Pr. 211.

A nonsuit of the first character involving the right of a party to withdraw his suit, it is believed, was never denied to the party in this State or England, at any time before the judgment is rendered on a verdict of a jury.

J. L. Stark, T. W. Park and *N. B. Hall* for defendants.

It has been held in many cases, that leave must be had from the court to enter a *nonsuit*, and then must be claimed before trial. *Lock et al.* v. *Wood*, 16 Mass. 317. *Cate* v. *Pecker et al.*, 6 N. H. 417.

When leave of the court is obtained, it must appear that the

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plaintiff has good cause of action, and that he without fault has mistaken the grounds of his right. *Dow* v. *Hinesburgh et al.*, 2 Aik. 18.

After judgment to account and appointment of auditors, who may in certain cases proceed *ex parte*, and pending this rule, the plaintiff had not the right to enter a nonsuit. *Haskell* v. *Whitney*, 12 Mass. 47. Comp. Stat. of 1850, p. 289, § 4.

By the Court. The only question arising in the present case is in reference to the right of the plaintiff in *book account* to become *nonsuit* in the action, after the case goes before the auditor. The general rule of practice in regard to actions, triable by jury, is to allow the party, as matter of right, to enter a *nonsuit*, at any time, before the verdict.

But that rule does not apply to the action of book account, after judgment to account. The statute, by providing, that when either party, upon due notice, neglects to appear, the auditor may proceed to audit and adjust the account *ex parte*, seems to imply pretty clearly, that the plaintiff can no more withdraw from the case and become *nonsuit*, than in common law actions he can, after judgment upon *demurrer*, or by default, or *nil decit*, in his favor. And in such cases it is not matter of right for the plaintiff to become *nonsuit*. The case after judgment to account is under the control of the court, like a case referred, by consent of parties, under a rule of the court. The plaintiff is not at liberty to become *nonsuit*.

What would be the effect upon the plaintiff's account, where he never presents it before the auditor, or having presented it, withdraws it, we are not called upon to decide. We see no reason to doubt, however, that where the account of the plaintiff is only brought to the knowledge of the auditor, or justice, by the defendant, as in the case decided by this court, in this county, and cited in argument, it could not bar the claim.

Judgment affirmed.

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CASES

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FEBRUARY TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

SAMUEL WOOLEY *v.* HEBER CHAMBERLAIN AND ROYAL FLINT.

[IN CHANCERY.]

Answer in Chancery. Estoppel in pais. Rents and profits.

An answer in chancery, (where the defendant has no actual knowledge of the points, and does not profess to have any, and is not either by the form of the bill, or the interrogatories, called upon to make answer to the points,) is regarded in this State, as a mere denial, or traverse of the bill, and this leaves the points, to be proved by the orator, by the ordinary manner of proof.

And where the defendant, in a bill of foreclosure, is the original mortgagor, his answer is never regarded as evidence to impeach the consideration of the mortgage securities.

And even if the answer might, under some circumstances, be regarded as evidence upon the question of the execution of the mortgage securities, including the mat-

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ter of delivery; it could never be regarded as extending to a subsequent incumbrance, to one who knew nothing of the facts.

And estoppel *in pais* is an equitable abandonment of a claim, a kind of perpetual disclaimer, and a party cannot be covertly led into it; he must be made perfectly aware of the interest of the party making the inquiry, or that his declaration is going to be, or will be likely to be relied upon, by some one.

Where a note was shown in the orator's possession in October, 1848, and secured by a mortgage duly executed in 1843, and then recorded, and the note bearing that date, it was held entitled to be regarded as having existed and been delivered at that time, so as to make it incumbent upon the defendant to impeach it.

APPEAL from the court of chancery. The orator alledged in his bill, that Heber Chamberlain being indebted to one Solon Clark, in Rochester, Vermont, for eleven hundred dollars, (specifying the notes,) to secure the amount, on the 6th day of September, 1841, made mortgage of certain lands in said Rochester,—being the farm which said Clark had that day conveyed to the said Heber Chamberlain; that on the 16th day of October, 1848, said Clark assigned the mortgage to the orator, in consideration of $600 and also the notes; that on the 23d day of September, 1843, the said Chamberlain, being indebted to the orator in the sum of five hundred dollars, conveyed the land to the orator. Long after this, Royal Flint, having recovered judgment against said Chamberlain, levied the same upon the land mortgaged. Claim for foreclosure against both. The bill was taken as confessed, as to Chamberlain.

The defendant Flint answered, admits the mortgage and the assignment of the notes then due, which the defendant claims was only $600, and consents to decree to that amount, and sets forth his judgment and levy, but denies that he claims against Clark's mortgage, and denies that Wooley had any other mortgage except the Clark, but admits that such a deed was procured to be executed by Chamberlain, but denies that the same was delivered until after Flint's attachment, and charges that it was without consideration, and fraudulent, and that if any indebtedness then existed, it has long since been paid. That Chamberlain represented that he owned the land, except the Clark mortgage, and that on the faith of the truth of such representations, he trusted him and made no examination into the records, and had not the least suspicion of the existence of any such mortgage as that last set forth.

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Claims that his debt was justly due, setting forth the debts, judgments and levy, subject to the mortgage of Clark only; that Chamberlain failed about the first of January, 1848, and is still insolvent, and that he, the said Flint, has no other security.

Traverse and supplemental answers.

That he first heard of said mortgage last named, the 10th day of January, 1848, and verily believed it merely colorable, and for Chamberlain's benefit. Applied to plaintiff to know if he owned any land or claimed any interest in any lands in the town of Rochester, and was informed that he did not, and on the faith of that assertion made his levy as he did, and now claims that plaintiff shall not be allowed to make a case different from his claim at that time, upon which he has relied.

Traverse and testimony.

The testimony of Heber Chamberlain, one of the defendants, was taken by plaintiff, and proves the mortgage executed by him and delivered to the plaintiff for his benefit, that it was delivered by the witness in October or November, 1843, was then indebted about $800. That there were five promissory notes,—that he gave the $500 note at the time the plaintiff took the mortgage, and took up other notes and accounts to make it that amount; that this was in accordance with an agreement between witness and plaintiff.

Defendants' testimony. John Trask, town clerk of Rochester, and made the mortgage, at the request of Chamberlain, and recorded it; saw no note, to his recollection at the time; Chamberlain paid for making and recording deed,—did not know Wooley.

Lyman Ellsworth testified that he went to Grafton, Vt., to talk with plaintiff; represented himself as a dealer in wool, and in pursuit of wild land; understood plaintiff to say that he owned no land in Rochester and had no interest in land in that town.

Decree for the orator for the full amount of both mortgages, April term, 1851. From which decree the defendant appealed.

A. Stoddard for orator.

1. The mortgage deed from Chamberlain to Wooley was executed *bona fide*, and for the amount of the note set forth and described therein.

The deed was duly executed, delivered and recorded.

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The $500 note, described in the mortgage and set forth in the bill, is proved and unpaid.

The execution, delivery and recording of said mortgage deed, was long previous to the time when the defendant Flint's lien was created, and to Chamberlain's indebtedness to him.

2. The orator is not *estopped* from claiming under said mortgage.

Estoppels in pais go upon the ground that it would be *fraud* for a person, by his admission, to induce another with whom he has dealing, into a course of conduct that would be injurious to him if the party making the admission be not estopped from denying it. 2 Cowen's Phil. 200, 203. Judge Cowen's definition of *estoppels in pais* in *Dazell* v. *Odell*, 3 Hill 219, cited in 2 S. L. C. 532. *Hicks et al.* v. *Crane et al.*, 17 Vt. R. 449. 2 S. L. C. 533. 5 N. H. 456, *Tufts* v. *Hays*. 11, Ib. 259 *Davis* v. *Sanders*.

The only testimony bearing upon the estoppel is that of Ellsworth, who testifies that he called at the orator's house in July, 1848; that he did not disclose the object of his visit, whose agent he was, or Chamberlain's indebtedness to Flint, and that nothing was said about a mortgage.

The orator's claim upon the land at the time of the chancellor's decree was $1,413 87, exclusive of costs, the value of the land as shown by the testimony of Harvey is $1100.

The orator, therefore, prays this court for such a decree as will entitle him to an execution for his costs, both in this court and before the chancellor.

E. Hutchinson for defendants.

1. There was error in the decree in allowing the Wooley mortgage.

The *delivery* of a deed, or other writing, is as necessary to its validity, as its execution, and it only takes effect from its delivery, *Stiles* v. *Brown*, 16 Vt. 563.

A creditor who attaches the land of his debtor after a deed conveying such lands has been executed and recorded, but before it has been accepted by the grantee, will hold the land as against such deed. *Denton* v. *Perry*, 5 Vt. 382.

The general rule of evidence is, that it requires the testimony of two witnesses, (of *more than one* by *all* the authorities,) to overcome the denial of the answer, in a matter responsive to the bill,

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or such corroborative circumstances as shall be equivalent to such additional testimony. It is believed that no reported case can be found, where the orator has had the decree upon such an amount of testimony only in his favor, as in the present case. We refer to a few of the leading authorities. *Pierson* v. *Catlin*, 3 Vt. 272. 2 Story's Eq. Ju. Ch. 43 § 1528. *Porter* v. *Bank of Rutland*, 19 Vt. 410. *Pilling* v. *Armitage*, 12 Ves. 80. *Biddulph* v. *St. John*, 2 Sch. & Lef. 521–532. *Kemeys* v. *Proctor*, 3 Ves. & Bea. 58. *E. S. Co.* v. *Donalds*, 9 Ves. 275. Gresley Eq. Ev. 4.

The testimony of Chamberlain, (if a competent witness for the orator,) is attended with many circumstances, always held to create a suspicion of its truth. Gresley's Eq. Ev. Pt. 3 Ch. 3, p. 361–2.

The weight of presumption is against the truth of Chamberlain's story. The case discloses the means within the orator's reach, if true, to support it by other direct testimony, which he has not done. Gresley's Eq. Ev. Pt. 3, Ch. 4, last page of Ch.—title "*General Observations.*"

The supplemental answer sets forth matter, which we claim as an *estoppel* upon the orator. (See L. Ellsworth's testimony.) *Broome* v. *Beers*, 6 Conn. R. 198.

2. There is error in the decree also in this—that it is for the whole amount of both mortgages and interest and accruing interest to become due; when the testimony shows the orator to be, and to have been in possession of the receipt of the rents and profits of the mortgaged premises, since April 1, 1848.

A deduction should be made, at least for that, to be ascertained by a reference.

The answer tenders to orator a decree for the amount of the Clark mortgage and the costs of an ordinary bill of foreclosure. Inasmuch as he has gone for more, (if he does not succeed upon both mortgages,) we claim costs throughout, with the above deduction.

The case was heard and reserved till the circuit term at Woodstock, in Windsor county, on the second Tuesday in September, when the opinion was delivered by

REDFIELD, J. The bill in this case seeks a foreclosure upon two mortgages. In regard to the first there is no controversy.

In regard to the second, the bill is in the ordinary form of a

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bill for foreclosure. The bill charges that the mortgage was executed by the defendant Chamberlain, on the 23d of September, 1843, to the orator to secure the payment of a promissory note for $500, which he then owed the orator, and which he has never paid. The bill further alledges, that the defendant Flint recovered judgment against Chamberlain and levied upon the premises, at a subsequent date, as the property of Chamberlain, and asks for a foreclosure of the title of both defendants.

The bill is taken as confessed, against Chamberlain, and is answered by Flint. Flint admits the execution and recording of this mortgage, before his levy, but denies its delivery, until after that date. He also denies the *bona fide* character and consideration of the note secured by this mortgage. This answer is traversed and testimony taken upon both sides.

1. It is claimed by the defendant Flint, that his answer is to be regarded as evidence in the case, in regard to the time of the delivery and the consideration of the note.

But this we think is clearly not admissible, for two reasons. First. Flint has no actual knowledge in regard to either of these points, does not profess to have any, and is not supposed to have any in the bill, and is not either by the form of the bill, or the interrogations, called upon to make answer upon either of these points. Under such circumstances, it is now regarded as settled in this State, that the answer is a mere denial, a traverse of the bill, and leaves the point to be proved by the orator, by the ordinary measure of proof, the same as where the defendant formally commends the orator to such proof, as he may be able to make, acknowledging his own utter ignorance upon the point.

Secondly. Even where the defendant in a bill of foreclosure, is the original mortgagor, and has actual knowledge of the execution and delivery of the deed, bond, or note, his answer is never regarded as evidence to impeach the consideration of the mortgage securities. Possibly the answer might under some circumstances, be regarded as evidence upon the question of the execution of the mortgage securities, which would include the matter of delivery, but could never be regarded as extending to a subsequent incumbrance, who knew nothing of the facts. This point was expressly decided by this court in the case of *Loomis* v. *Fay & Patchin*, in the circuit term, in Rutland county, in June.

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The deed then being produced by the plaintiff and recorded, after acknowledgment in the usual mode, must be regarded as *prima facie*, executed at the time it purports to have been. And the note being also in the custody of the plaintiff, and confessedly signed by the defendant Chamberlain, is good until impeached.

This is attempted in two modes. First. By what is claimed as an estoppel *in pais*. But we cannot think the testimony shows what amounts to an estoppel *in pais* upon the orator. To have that effect, he must have had his mind brought to the very point of the subsistence of the second mortgage upon this very lot, and either have been told that Flint wished to levy, or some other creditors, or in some way have been made aware of the importance and necessity, for the safety of others, that he should state the extent of his claim upon the land. An estoppel of this kind is an equitable abandonment of a claim; a kind of perpetual disclaimer, and a party cannot be covertly led into it. It goes upon the ground of the obligation resting upon one owner, or part owner of the property, to disclose the true state of his title to another who is, or who is about to become interested in the same thing. And the party, to be affected by the estoppel, should be made fully aware of the interest of the party making the inquiry, or that the declaration is going to be, or will be likely to be relied upon by some one.

The proof, in the present case, is altogether bare of any such ingredient. The manner in which Lyman Ellsworth approached the orator was calculated, and was very obviously intended to put Wooley off his guard, and lead him to suppose Ellsworth had in fact, no interest in this particular land, but the contrary. The idea that one is to disclaim his rights, beyond all recovery, without being made aware what he is doing, is certainly very far from the fair import of an estoppel *in pais*. We think the old doctrine, that estoppels are odious, might very justly be applied to one of this character, which one is to be made to incur, covertly, and so to speak, by a kind of slight of hand.

Secondly. The only remaining ground upon which it is claimed that the orator should not have a foreclosure upon this second mortgage, is that the proof, fairly weighed, fails to show its continuing force and obligation. The testimony seems to show the existence of the note for $500 at the time of the hearing before

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the master, and indeed as early as October, 1848, Flint's title accruing the January before. (We have no copy of this $500 note furnished to the court, but it seems to be conceded, on both sides, that the note is in the case, and our opinion is based upon that supposition. If that be not the fact, the evidence would certainly merit a somewhat different consideration.)

This note then, being shown in the orator's possession as early as October, 1848, and being secured by a mortgage, duly executed in 1843, and then recorded, and the note bearing that date, it will be fairly entitled to be regarded as having existed and been delivered at that time.

It is then incumbent upon the defendant to impeach it. This he cannot do by his answer, for he has no knowledge upon that point, and if he had, his answer at the most, is only testimony to the fact of delivery and not to impeach the consideration. *Adams* v. *Adams*, 22 Vt. R. 68 *et. seq.* And upon the point of the delivery of this note, it must be very obvious to any one, that the conviction of the mind upon this subject would stand very different if the party executing the note, declared in his answer, that it was not, in fact, delivered until after Flint's title accrued, from what it now does, upon the simple denial of Flint.

In regard to this proof, aside from the issue, for the bill and answer in this case, amount to nothing more, it will very readily occur to any one, that the hypothesis assumed by Flint, is a very possible one, and there are, no doubt, some circumstances tending to induce us to apprehend that the truth even, may lie in that direction. The declarations of Wooley, made to Ellsworth, if faithfully reported by him, certainly look as if orator probably would not have said all he did, if this $500 mortgage, and $300 more of debt, had then been owing to him from Chamberlain, and a mortgage in present existence for the $500.

But there is doubtless something to be said in regard to Ellsworth's testimony. Wooley may not have felt bound, under the circumstances of that conversation, to state all his private matters of deal with Chamberlain; some men would, and more perhaps, would not have done it. The appearance of Ellsworth, and his declarations to Wooley, seem to represent him at that time as acting the part of a dealer in wild lands and in wool, and beyond this, Wooley would not have been bound, by terms

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of the utmost courtesy perhaps, to disclose his private dealings with Chamberlain.

The testimony of Chamberlain on the other hand is full to the point of consideration and delivery, and it seems to us probable, and very considerably confirmed by the old notes and the conduct of the parties at the interview in October, 1848. This latter matter, however, could scarcely be regarded as of much weight in a legal point of view.

The testimony of Trask does not seem to us to detract at all from that of Chamberlain. A recollection of his "*hesitation*" at that length of time, under the circumstances, is certainly not much to be relied upon.

Notwithstanding then we might believe it possible, or even have some doubts, we could not set aside this mortgage short of some satisfactory evidence. And it does not seem to us to exist in the case.

The rents and profits, ought to be deducted from the amount due, but we do not learn that that was insisted upon in the answer or before the master, and if it is now denied, the chancellor will no doubt order it done in the proper form, if it is deemed of any importance, and upon proper terms. The decree of the chancellor is affirmed, and the case remanded to the court of chancery to be there carried into effect.

II. Amidown & Co. v. Osgood & Minard.

Book Account. Practice. Dissolution of Copartners. Liability of the retiring partner.

If a question is not raised in the court below, it cannot be urged or insisted upon as forming any ground of error in the supreme court.

Where goods were delivered before any publication of the dissolution of the partnership, and the retiring partner still remained in the store, though in the capacity of clerk, but with the old sign up, it was held, that the credit must be regarded, as fairly given to the partnership, and that the vendor of the goods, in regard to dealings was entitled to the same notice, as if the first dealing had been before the actual dissolution of the copartnership.

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BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the following facts:

That the goods specified in a bill marked "A." amounting to the sum of $47,14 were sold and delivered by the plaintiffs to George Minard, on the twenty-eighth day of April, 1849, and also the goods specified in a bill marked "B." amounting to the sum of $114,04 were sold and delivered to George Minard, on the eighth day of October, 1849, and that said goods have not been paid for, or any part of them. That during the year 1848, and up to the first day of April, 1849, the said Minard and defendant Osgood, were doing business in the village of Bellows Falls, as copartners in the mercantile business, under the name and firm of Osgood & Minard.

That on the first day of April, 1849, they dissolved said copartnership, and business was carried on or continued in the same store by the said Minard until sometime in the month of January, 1850, when said Minard failed.

That while said Osgood & Minard were in company they kept a sign upon the store occupied by them, with the name of the firm upon it, and that said sign remained upon said store unaltered up to the time said Minard failed, in January, 1850.

That in the latter part of August, 1848, one Wm. A. Beecher, a clerk of the plaintiffs, noticed the sign of the defendants, and called at their store, had conversation with said Minard, and invited him to call upon plaintiffs and purchase goods; that in April, 1849, said Beecher saw said Minard in Boston and again urged him to call upon the plaintiffs; that in consequence of said invitation said Minard did call upon the plaintiffs and purchased the goods specified in bill "A."; that nothing was said by either party about the dissolution of the firm of Osgood & Minard; that the bill was made out and forwarded with the goods to said Minard in the name of Osgood & Minard; that Minard did not know in whose name the bill was made out until he received said bill, and did not then inform the plaintiffs that it was incorrect.

That a Mr. Harding, one of the plaintiffs' firm, was in Bellows Falls in the summer of 1849, between the times of the purchase of the goods named in said bills, and called at said Minard's store, had conversation with said Minard, but nothing was said

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about the dissolution of said firm of Osgood & Minard, or of the error of said plaintiffs in charging said goods to the defendants.

That said Minard without further invitation called at plaintiffs' store in October, 1849, and purchased the second bill of goods, marked "B."; that nothing was then said of the dissolution of the said firm of Osgood & Minard, and that said Minard at this time purchased a shawl for his wife and paid the money for the same. That it did not appear whether said bill was handed said Minard in Boston or sent with the goods.

That soon after the return of said Minard from Boston, in April, 1849, when the first bill of goods were purchased, a notice of the dissolution of said firm of Osgood & Minard was published in the Bellows Falls Gazette; that Osgood, after the dissolution, April first, 1849, remained in the store for said Minard until after his return from Boston, and then removed to the West.

That sometime between the purchase of the goods, October 8th, 1849, and the purchase of goods October 18th, 1849, of the plaintiffs in his name alone to the amount of $30,72, said Minard sent a quantity of mittens to the plaintiffs, with an accompanying letter consigning them in his own name, and that at the time of forwarding to the order of Minard the last named bill of goods to the amount of $30,72, the plaintiffs had in their possession mittens, more than sufficient to pay the amount of said last named bill.

The auditor found due plaintiffs on Bill "A." $51,36 and on bill "B." $124,04, making in all the sum of $175,40, subject to the opinion of the court, whether from the facts, plaintiffs are entitled to recover for either or both said sums.

The county court, April term, 1851,—COLLAMER, J., presiding,—rendered judgment on the report in favor of the plaintiffs. Exceptions by defendants.

Stoughton & Baxter for defendants.

We insist that inasmuch as the plaintiffs never had any deal with the defendants during their said copartnership, that no notice of the dissolution was necessary to protect the retiring partner from liability. 3 Kent Com. 67. More especially if the retiring partner was not by his own permission held out as a partner, and credit given to him by the plaintiffs. 54 Com. Law 31.

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The case simply shows that the plaintiffs clerk after the dissolution saw the names of the old firm upon a sign over the door of the store, but it nowhere appears that this fact was ever reported by that clerk to the plaintiffs.

The report shows that one of the plaintiffs in the summer of 1849, and after the dissolution had been published in the Gazette, was at Bellows Falls, but it does not appear that he ever saw said sign. Now, we insist that the court are not at liberty to *infer* that the retiring partner *permitted* himself to be held out as a partner, and that the plaintiffs gave credit to him. 54 Com. Law 31. 47 Com. Law 580. 29 Com. Law 377.

The publication of the dissolution, was after the first purchase and before the second, advertised in the Gazette, and this was all the notice necessary to protect the retiring partner from liability to those who had had no deal with the firm during the continuance of the copartnership. *Prentiss* v. *Sinclair*, 5 Vt. 149.

The auditor finds the fact that the mittens consigned to the plaintiffs were more than sufficient to pay the bill of $30,72, and it is clear that the goods thus consigned although in the name of Minard, must be applied in payment of the earlier account. 30 Eng. Com. Law 283.

A. Keyes for plaintiffs.

1. In the sale of the bill "A." the plaintiffs were dealing with an old firm known to them as such, and without any notice express or implied of a dissolution, they were not affected by the dissolution, whatever it was. 8 Wend. R. 423–4. 6 Johns. R. 144. 6 Cowen 701–4. Collyer on Part. 310, 312. *Prentiss* v. *Sinclair*, 5 Vt. 149. *Atwater* v. *Moore*, 10 Vt. 75. Story on Part. 247 to 252.

2. Bill marked "B." was sold after dissolution published in Bellows Falls Gazette. But no actual notice was given the plaintiffs, and as they had been former customers of the firm they could not be affected by presumptive notice. *Graves* v. *Merry*, 6 Cowen 701–4, and authorities cited.

The purchase of the shawl for his wife and paying the money, while bill "B." was taken on credit, tended to confirm the plaintiffs that they were dealing with Osgood & Minard.

3. The charge of the last bill "C." to Minard alone can have

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no effect to alter the case, for Minard had then a credit for mittens sent plaintiffs, more than sufficient to pay that bill.

By the Court. There does not seem to be any good reason to require the plaintiffs to set off the value of the mittens consigned to them by Minard, against the goods sold on the credit of Osgood & Minard, if the plaintiffs were justified in so selling the goods. For firstly, no such question appears ever to have been raised in the case before this time, and by every rule of practice it must have been raised in the court below, in order to form any ground of error in this court. Secondly, if the two first bills of goods were fairly delivered on the credit of Osgood & Minard, then there can be no doubt the offset must first be applied to extinguish Minard's own debt, which may have been contracted upon the faith of this very consignment. The only question, then, is, whether defendants are liable for the goods charged to them.

The law requires, that upon the dissolution of a mercantile partnership, notice of such dissolution shall be published in a newspaper circulating in the place of such business, in order to exonerate the retiring partner, even, as to those with whom the firm have had no previous dealings, and as to these latter actual notice is required.

In the present case there can be no doubt the goods were really delivered, upon the credit of the partnership, which is the ground of decision in the case cited, 54 Com. Law 31. And as to the bill marked "A." the goods were delivered before any publication of dissolution, and while Osgood still remained in the store, as clerk to be sure, but with the old sign still up. Under these circumstances it seems to us the credit must be regarded as fairly given to the partnership. And in regard to future dealings we do not see why in justice the plaintiffs should not be reasonably entitled to the same notice, as if the dealing had been before the actual dissolution. Osgood knew that the firm would be liable for all goods bought by Minard on the credit of the firm, before the publication of the dissolution, and as he trusted him with that power, it is but reasonable he should be bound to take notice how he used the power, and be bound by his use of it, the same as if he had actual notice, and so in reality to be bound by his abuse of the power.

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This would impose upon him the necessity of searching out those with whom Minard had dealt upon the credit of the firm, before the publication of notice of the dissolution of the copartnership, and give them actual notice of such dissolution. There seems to be some equity in requiring this in the present case, as if Osgood had had actual notice of the purchase of the first bill of goods upon the partnership credit.

The dissolution did not become effectual, as to third persons, until the publication. As to everybody but the parties, the date of the dissolution is the time of the publication, as the date of the record of a deed is the date of the deed to all purposes of third persons, who have acquired interest in the land subsequent to the date of the deed.

Judgment affirmed.

REUBEN WINN v. STEPHEN AVERILL AND OTHERS.

Amendment.

The plaintiff commenced his action on book account against several defendants, and the same was committed to an auditor, who made his report to the county court; before said report was accepted, the plaintiff moved the court for leave to strike out the name of Rufus Chase, one of the defendants, it appearing that said Chase was not in life when the services for which the plaintiff claims a recovery were contracted for and performed. The court granted the leave asked, and thereupon rendered judgment on the report for the plaintiff against the other defendants. It was held that the court, in allowing this amendment, did not exceed their power and duty.

BOOK ACCOUNT. The action was commenced before a justice of the peace and came to the county court by appeal, taken by the defendants. Judgment to account was rendered in the county court, and an auditor appointed, who made his report. At the September term of the county court, A. D. 1851,— COLLAMER, J., presiding,— the plaintiff, after the report was filed, moved for leave to strike out the name of Rufus Chase, one of the defendants, it appearing, from the report, that said Chase was not in

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life, at the time when the services for which the plaintiff claims a recovery were contracted for and performed. Leave was granted as asked for, and thereupon judgment was rendered for the plaintiff upon the report. To the granting of said leave, and to said judgment, the defendants excepted.

O. L. Shafter for defendants.

1. The court had no power to allow the amendment. *Emerson* v. *Wilson*, 11 Vt. 357. *Bowman* v. *Stowell et al.*, 21 Vt. 309. *Claremont Bank* v. *Wood et al.*, 12 Vt. 252. *Loomis* v. *Barrett*, 4 Vt. 450. Acts of 1835, p. 7.

2. If the amendment was improperly made, then the judgment was erroneous on the ground of the misjoinder. Chit. Pl. 1. 50*a*.

J. E. Butler and *W. H. Follett* for plaintiff.

If the writ and declaration had been issued against these same defendants, describing them as survivors of Rufus Chase, there would it seems have been no legal variance. *Bailey* v. *Hodges et al.*, 19 Vt. 618.

Suppose all the facts detailed in the bill of exceptions had been set forth in the writ, it would be rejected as surplusage, and should be so taken.

These exceptions are in the nature of a plea in abatement, and the reasons why some things in the book account action may be taken advantage of before the auditor as nonjoinder, &c., is because it cannot be known before. But the fact that Rufus Chase was no party and was not in existence was known, and should have been taken advantage of in abatement. 12 Metcalf 266.

The opinion of the court was delivered by

Isham, J. On the coming in of the report of the auditor in this case, the county court, on application by the plaintiff, permitted the name of Rufus Chase to be struck from the record as one of the defendants, and rendered judgment on the report against the others. We learn from the case, that Mr. Chase was one of the original petitioners, but that he deceased in 1846, and before the rendition of these services, or commencement of this action. The right of action on his decease, survived against these defendants, as against them an action can be sustained, but not against Mr. Chase, or any one representing him.

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We entertain no doubt, as to the power and duty of the court, in allowing this amendment of the record, and striking his name therefrom as one of the defendants, no more, than if such a man had never existed, or the name was entirely fictitious. In the case of *Leverett* v. *Harris*, 7 Mass. Rep. 292, and *Parsons* v. *Plaisted*, 13 Mass. Rep. 189, it was held, that a wife could not be sued with her husband, on covenants executed during coverture, and on motion her name was stricken from the record, as one of the defendants, and the case proceeded against the other defendant. In the case of *Whitluck* v. *Cook*, 15 John. Rep. 483, the question arose, under similar circumstances, and on motion, the plaintiff was permitted to enter a *nolle prosequi* as to the wife, as the plaintiff had a cause of action against the husband. See also *Rehoboth* v. *Hunt*, 1 Pick. Rep. 224, where a writ of entry was amended by striking out the name of one of the demandants. "The rule seems to be that *no new parties* can be *added* by "amendment." 2 Fairf. Rep. 127. 1 Wend. Rep. 71. "But "parties unnecessarily and improperly made such, and having no "interest in the matter may be stricken out, where the cause or "nature of the action is not affected, and no injury can accrue to "the defendant."

It will be observed that in the above cases, the amendments were allowed, where the party stricken from the record had a real existence, was duly served with process, and could on judgment being rendered have been charged on execution. And if that rule prevails in those cases, much more should this have been allowed, where the person whose name has been struck from the record had no existence, when the cause of action accrued, was never served with process and against whom no judgment could have been rendered.

Our statute of amendments, p. 223, Sec. 31, is quite as liberal as the late English act, 9 Geo. 4, generally termed Lord Tenterdan's act, and the courts, both in England and this country, manifest an increasing disposition to give to these statutes the most beneficial effect, not suffering the end of a suit to be defeated, where the record contains the substance of a valid claim. This being the only question presented in the case, the judgment must be affirmed.

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PERRY & MOORE *v.* WHITMAN WHEELER.

Assumpsit. Contract.

In case of a mere executory contract to sell and to buy on a certain day, where each promise is the entire consideration for the other promise, neither party can maintain an action, without avowing a readiness to perform on his part at the time and place, or an excuse, by the act of the other party.

ASSUMPSIT. The suit was commenced before a justice of the peace, and came to the county court by appeal. Plea, general issue, and trial by jury.

It was agreed by the parties, that the plaintiffs were partners as alledged in the declaration, and that by the contract on which the action is brought, the plaintiffs were to take, and the defendant was to deliver the twenty-six lambs named in the declaration at the place therein named, and for the price therein named, on the fifteenth day of August, 1850, that being the day on which the plaintiffs were to take other lambs bought by them, in the vicinity of the defendant. And it appeared in evidence, that plaintiffs made no call on the defendant for a delivery of the lambs until the sixth day of September, 1850. It further appeared, that on the 18th day of August, 1850, the defendant sold the said lambs to a drover from Massachusetts, and on the 22d of the same month delivered them to said drover in pursuance of said sale. The plaintiffs also introduced testimony tending to show the amount of damage they had sustained by the breach alledged.

The county court, September term, 1851,— COLLAMER, J., presiding,—directed the jury to return a verdict for defendant. Exceptions by plaintiffs.

O. L. Shafter for plaintiffs.

The failure of the plaintiffs to take the sheep at the day did not give the right to rescind. The defendant was bound to wait at least a reasonable time, and that question should have been submitted to the jury. Chit. on Con. 427, *Hende* v. *Whitehouse*, 7 East 571. *Bloxam* v. *Saunders*, 4 B. & C. 945. *Wilmshurst* v. *Bowker*, 5 New Cases 551.

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Stoughton & Baxter for defendant.

In actions for damage in case of non-delivery the plaintiff must alledge and prove on trial that he was present at the time and place ready and willing to receive and pay for the property. *Tapping* v. *Root*, 5 Cowen 404. Phil. on Ev., Cowen & Hill's Notes, p. 102, notes 297 and 298.

When a party wholly fails to perform an offer, after the time elapses, the adverse party is under no obligation to perform. *White* v. *Yaw*, 7 Vt. 357. *Cleaveland* v. *Burton et al.*, 11 Vt. 138.

Payment or earnest money vests the property in the vendee. Lang on Sales, 270.

In the case at bar no earnest was paid, the contract was certainly executory and no property passed.

By the Court. If this case were of an amount sufficient to justify severe scrutiny, or to call it forth, there is no doubt ground for extended debate in regard to the particular class of contracts under which it falls. The facts are very loosely stated, the declaration is lost, and it is not easy to say precisely how the case did stand in the court below. But all reasonable presumptions are to be made in favor of judgment.

It does not appear, that the particular lambs were designated, or that any thing was done to pass the title from the vendor to the vendee. If that were the case it is doubtful whether the vendor could resell, without giving notice to the vendee, as in the case of a pledge of chattels, but we do not deem it necessary to go into this point. And an examination of the cases is important to determine how far such notice is required even in a case where the title passes subject to the vendor's lien for the price.

But the case seems to us to be a mere executory contract to sell and to buy on a certain day. In such case each promise is the entire consideration for the other promise, and neither can maintain an action without avowing a readiness to perform on his part at the time and place, or an excuse, by the act of the other party, such readiness is in the nature of a condition precedent. Chitty on Contracts, 738, and note and cases cited.

Judgment affirmed.

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The Towns of Rockingham and Grafton *v.* The Town of Westminster.

Petition for Certiorari. Apportionment of expenses, for building roads and bridges among towns, under the statute.

The application, for the writ of *certiorari*, is addressed to the discretion of the court, and will not usually be granted unless the substantial justice of the case requires this remedy.

Commissioners, appointed under the statute, to apportion to towns the share of expense each shall bear, in the construction of bridges and roads, where one town is found to be excessively burdened, by defraying the whole expense, and other towns are benefitted by the construction of the same, cannot make an apportionment in specific sums of money, to be paid by each town, but are to settle and define the *ratio* of expense to which each shall be subjected.

And where the commissioners found the expense of the construction of a bridge to be $1890 20, and apportioned $600 to one town, and $150 to another town, of that sum, and the county court, in passing upon the report, regarded the sums apportioned to the respective towns, not as the amount they are actually obliged to pay, but as fixing, with the estimated expense of the bridge, the *ratio* which they are liable to have apportioned, and accepted the report and adopted as the *ratio* of apportionment the sum that $600 bears to $1890, in the one case, and the sum $150 bears to $1890 in the other. It was held, upon application for the writ of *certiorari*, that the petitioners had no right to complain of this apportionment, and that there was not such error in the decision of the county court as to entitle the petitioners to this remedy.

Petition for Certiorari. The selectmen of the town of Westminster, petitioned the county court, April term, 1849, setting forth that said town had been required to build and make a bridge across Saxton's River in said town, and a new piece of road at each end of said bridge, which bridge and road are evidently for the accommodation of other travel than the inhabitants of said town of Westminster, and is more especially for the accommodation of the towns of Rockingham, Grafton and Athens. And that said town of Westminster would be excessively burdened by building said bridge and road. And praying that commissioners be appointed to apportion said expense among said towns.

The county court appointed commissioners, who reported that said town of Westminster would be excessively burdened, and that the towns of Rockingham and Grafton would be benefitted. That the whole expense for constructing said bridge would be $1890,20,

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and that it is just and reasonable that said town of Rockingham pay $600 thereof, and the town of Grafton pay $150 thereof, making in all $750.

The county court accepted said report, and ordered that the town of Rockingham pay the town of Westminster, on demand after the completion of said bridge and road, six hundred eighteen hundred and ninety-one and twenty-one hundredths parts of the cost of said bridge and road (600–1890,20) and the town of Grafton one hundred and fifty eighteen hundred and ninety-one and twenty-one hundredths parts of the said costs of said bridge and road (150–1899,20,) and that the town of Westminster recover of the towns of Rockingham and Grafton their costs, whereof they may have execution. Execution issued May 7, 1851.

Exceptions by Rockingham and Grafton and petition for *certiorari.*

A. Stoddard and *Stoughton & Baxter* for petitioners.

By the provisions of said statute, the county court, upon application of the selectmen of the town that may be required to build a road or bridge are to appoint commissioners to examine into the circumstances of such road or bridge, and to *apportion such part* of the expense of constructing the same, as they should deem just and reasonable, not exceeding one-half, to any other town or towns specially benefitted thereby, to be paid by such town or towns, *in such proportions;* and the county court, upon the report of the commissioners, may assess the town or towns so benefitted, *according to such report,* and make an order on the same in the same manner as is now provided by law, in case of roads or bridges located in, or running through two or more towns.

The act of 1847 must have reference to the law providing for the erection and repair of bridges in certain cases, by assessing a proportion of the expense upon adjoining towns. Comp. Stat. 169, § 47. The statute of 1797 is to the same effect, and to which this court has given a practical construction. *Brookline* v. *Westminster,* 4 Vt. 224.

The commissioners should have reported the proportion of the expense of constructing said road and bridge, required to be paid by the towns of Rockingham and Grafton, *leaving the specific sum* to be ascertained after the same were completed. This they did

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not do, therefore, the county court ought to have *rejected* or *recommitted* the report.

The county court had no authority to assess the *proportion* of the expense of constructing the road and bridge, *otherwise than according to the commissioners report.* By the report, the town of Rockingham is assessed the definite sum of $600, and Grafton $150. The report is not ambiguous, and admits of no other construction.

By the judgment of the county court, Rockingham is liable to pay $674,74, and Grafton $168,08, being $103,42 more than the commissioners assessed to said towns.

W. C. Bradley for defendants.

1. The commissioners, by estimating the expense, and deciding how much thereof each town should pay, sufficiently showed the proportion of each.

2. The commissioners and county court have found that the apportionment is not unjust.

3. The petitionee is deprived of no right of showing expense, as the amount will have to be recovered by action. *Brookline* v. *Westminster*, 4 Vt. 224.

4. Finally, in applications of this kind, this court will presume the court below to have acted rightly, until the contrary appears, and even then will not revise, if greater injustice will be produced thereby. *Royalton* v. *Fox et al.*, 5 Vt. 458.

The opinion of the court was delivered by

ISHAM, J. The application for the writ of *certiorari* is addressed to the discretion of the court, and will not usually be granted unless the substantial justice of the case requires this remedy.

The object of the writ, in this case, is to bring before this court the proceedings of commissioners under the 53d Sec. of the act for laying out and discontinuing highways and bridges, with the decision of the county court thereon, for the purpose of enabling this court to consider and determine upon the exceptions filed to the report.

We learn from the case, that by order of the county court, the town of Westminster were required to build a bridge across Sax-

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ton's river in that town, and that Westminster, feeling itself excessively burdened by defraying the whole expense therefor, preferred their petition, and thereby are seeking an apportionment of a part of the expense from other towns, as the bridge when constructed would be for their especial benefit and accommodation. The commissioners have found, and so state in their report, that the towns of Rockingham and Grafton would be accommodated by its construction, and should have apportioned to them a part of the expense. They have also found that the town of Westminster would be excessively burdened in defraying the whole expense, and *as a preliminary part to such finding* have estimated the expense of the bridge at the sum of $1,890,20. From the facts so found they have apportioned to the town of Rockingham the sum of $600, and to the town of Grafton the sum of $150.

Exceptions have been taken to this mode of apportionment by the commissioners, and it has been contended that they cannot make an apportionment in specific sums of money to be paid by the towns, but are simply to settle and define the ratio of expense to which they are to be subjected. And we entertain a decided conviction, that this is the true construction of the act, and presents the only feasible and proper mode of carrying into effect the purposes and objects contemplated in the statute. When this ratio of expense is settled and fixed by the commissioners, it becomes the basis upon which the court to which the report is returnable, may assess the towns so benefitted according to the report, and make their order on the same. When, therefore, the actual expense of the bridge is ascertained, whether more or less than the sum estimated by the commissioners, then the court by their order can divide the whole expense among the towns, on the ratio as fixed by the commissioners.

The proceedings of the commissioners in this case would be evidently erroneous if the towns assessed are subject to pay more than they would be required to pay on this construction of the act. But if the rule of apportionment adopted by the court and commissioners would not increase their liability, or if it should have the effect to lessen the amount below the sum at which they are assessed, then they have not sustained that injury or injustice that would warrant the issuing of this writ on their application.

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For it has been decided, that it is not sufficient that error exists in the proceedings of an inferior tribunal, or that they have mistaken the law, but to justify the issuing of this writ, it must also appear that injustice has been done to the petitioner. *Myers* v. *Pownal*, 16 Vt. Rep. 417.

The court have adopted the sum of $1890, as estimated by the commissioners, as the whole expense of the bridge, throwing off the fraction of a dollar as reported, and of which the petitioners have no reason to complain, and have adopted as the ratio of apportionment the sum that $600 bears to $1890, in one case, and the sum of $150 bears to $1890, in the other. If the estimated sum is the actual expense of the bridge, then the ratio of apportionment as reported is just and the petitioners have no reason to complain. But if the expenses of the bridge were less than that amount, the petitioners have reason to complain, if the sum apportioned to them is the amount they would be required to pay, as they would pay more than would be their proportion, on the ratio as reported.

But this difficulty is avoided on the principle decided in the case of *Brookline* v. *Westminster*, 4 Vt. 224. In that case it was held, that in an action on an assessment, in a similar case, the actual expense of the bridge was a subject of inquiry, and that notice of the actual expenditure should be given to the selectmen of the town sought to be charged. If, therefore, the actual expenses of the bridge was less than $1890 in the same proportion should the amount be reduced on the liability of the petitioners. In no event, therefore, on such facts could injustice be done to the petitioners. If the bridge should cost more than the estimated amount, whether the petitioners would be bound to pay more than $600 is a question we are not called upon in this case to decide. In that event they would have been obliged to pay more if this construction of the act had been adopted by the court and commissioners. But if by the order of the court, the whole expense is limited to that amount, then the petitioners have no reason to complain, for all these considerations have operated in their favor by lightening their liability. This question properly arises on the assessment when made by the county court, and is not now properly involved in this case.

Regarding, therefore, the sums apportioned to the respective

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towns, not as the amount they are actually obliged to pay, but as fixing, with the estimated expense of the bridge, the ratio of expense which they are liable to have apportioned to them. We see no occasion for these petitioners to complain, for the adoption of this rule is the most favorable one for them. The town of Westminster has more reason to complain, if they are limited to the amount adopted by the court and commissioners as the actual expenses of the bridge. For to the extent of that excess they would be the losers. But whether they are so limited or not, we express no opinion.

It is further objected that the commissioners rejected evidence showing that the town of Westminster was in reality benefitted rather than injured in making this bridge, as the expenses in its construction are not so great, or the charge so onerous as keeping in repair the old road which has been discontinued. If this is true in fact, still as the commissioners have found that Westminster is unreasonably burdened by these expenses, notwithstanding this benefit, the testimony became immaterial, and had it been received it could not have altered the result. The other objections not having been insisted upon, the result is, that this petition must be dismissed — with costs.

FRANKLIN H. WHEELER AND OTHERS v. ARTEMAS WASHBURN.

Principal and Surety.

M. as principal and W. as surety, executed a promissory note to G., for two hundred dollars. M. made a contract with G., in which G. agreed, on the payment of one hundred dollars on the said note, within two days, that neither of the signers should be called upon for the balance, until certain property, placed in G's. hands as security, was disposed of, and if not disposed of within six months, interest should not be cast after that time. It was held, that this contract did not discharge W. the surety, from his liability, though made without his knowledge or consent.

ASSUMPSIT on a promissory note, and was tried upon issue to the Court.

Upon the trial the plaintiffs, who were indorsees of the note,

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read in evidence without objection, the note declared on, its execution and indorsement being conceded, and then rested.

The defendant read the deposition of E. Mattoon in evidence, in which appeared the following agreement:—

"Brattleboro', January 24, 1851."

"Provided Mr. Elijah Mattoon, Jr., pay $100 within two days, "on the note which I hold against him and Artemas Washburn, "I hereby engage that neither shall be called upon for the bal- "ance, till I shall sell at the price he paid me, all the books be- "longing to said Mattoon, which he left with me on sale, I further "agree, that should I not dispose of said books, within six months "from the first of February next, they shall not be called upon "for the payment of any interest on said note after the expiration "of six months as above."

Signed, "JEREMIAH GREENLEAF."

It also appeared by the said deposition that the $100 was never paid, and that this agreement was made without the knowledge or consent of Artemas Washburn, the defendant. Other facts appeared in said deposition, but were not passed upon by the court. The defendant insisted, that he was discharged from the payment of said note.

The county court, September term, 1851,—COLLAMER, J., presiding, decided that the defendant was not discharged by the matters embraced in said deposition, and rendered judgment for plaintiffs, to recover the amount of said note and costs.

Exceptions by the defendant.

A. Keyes for defendant.

It is a principle well settled, that if the creditor make a binding contract with the principal to enlarge the time of payment, it discharges the surety. Chit. on Cont., 417. Burge on Suretyship, 204. *Austin* v. *Dorwin*, 21 Vt. 38.

What is meant by a *binding contract* has been decided differently by different courts. In some of the States, and in England the early cases make it necessary, that the contract tie up the hands of the creditor, so that he cannot sue the original claim, but the modern decisions have only required that there be a consideration for the contract to delay. *Wheat* v. *Kendall*, 6 N. H., 504. *Bai-*

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ley v. *Adams*, 10 N. H. 163. *Vilas* v. *Jones*, 10 Paige, 76. *Austin* v. *Dorwin*, 21 Vt. 38.

E. Kirkland for plaintiffs.

1. The giving of time does not discharge the surety, if the right to sue is retained. *Oxford Bank* v. *Lewis*, 8 Pick. 458. *Central Bank* v. *Willard*, 17 Pick. 150. *Bank of Utica* v. *Ives*, 17 Wend. 501. Chit. on Bills 446.

2. An agreement, to delay, made upon a promise to pay *extra* or *usurious* interest, is not a valid, nor a binding consideration, and does not prevent the creditor from sueing, or the surety from paying and sueing himself, and therefore does not discharge the surety. *Vilas* v. *Jones*, 10 Paige 76. *Vilas* v. *Jones*, 1 Comstock 274. *Kyle* v. *Bostwick*, 10 Ala. R. 589. 9 U. S. Dig. Art. 143. 9 ib. 408, Art. 36. 8 ib. 340, Art. 49. 7 ib. 454, Art. 39.

3. The agreement, with Greenleaf, is not binding on him, as it was without consideration, and a mere *nudum pactum*. *Pomeroy* v. *Slade et al.*, 16 Vt. 220. *Wheeler* v. *Wheeler*, 4 Vt. 66. *Pabodie* v. *King*, 12 Johns. 426.

The opinion of the court was delivered by

ISHAM, J. The defendant is prosecuted as surety upon the note described in the declaration, and claims to be discharged from any liability in consequence of a delay of payment granted by the creditor to the principal, without his knowledge or consent.

The case on examination seems destitute of those considerations necessary to make a defense of this character. To give effect to such contract, it is necessary that it be sufficiently certain to bind the creditor to delay, as between him and the principal,— something must have been done varying the legal and equitable liability of the principal, and entitling him to postpone the performance of the contract to a period more remote, than that fixed for its fulfillment. And if it wants any of those characteristics necessary to make it effectual as such, and render it legally binding, the surety will not be discharged. The test in all these cases is this: Could the agreement to delay have been enforced against the creditor either as a defense to the note, or as a cause of action. If it could the surety will be discharged, otherwise the agreement will be inoperative for that purpose. 2 Leading Cases in Equity, pt. 2, 379, 380.

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It is upon this principle, that it has uniformly been held in equity as well as at law, that the contract must not only be definite and certain in its provisions, but founded also upon a good and sufficient consideration. The court in allowing the exceptions in this case, refer to the deposition of Mattoon as containing the facts found to exist. The note was executed by Elijah Mattoon as principal, and the defendant as surety to Jeremiah Greenleaf, and was transferred to the plaintiffs by Greenleaf as collateral security for claims they held against him. The contract of Mattoon with Greenleaf was made January 24, 1851, in which he agreed on the payment of one hundred dollars on this note, within two days, neither of the signers should be called upon for the balance until certain property which had been previously placed in his hands, as security was disposed of, and if not disposed of within six months from the first of February then next, interest should not be cast after that time.

If the creditor had commenced a suit upon this note after making that arrangement, it is obvious from the authorities, that it would be no defense, nor would that contract be a ground of action,— even if the instrument is considered as having that mutuality that gives it the character of a contract between them, for the reason that there is no legal consideration for the contract. It is a mere *nudum pactum*. The promise to pay one hundred dollars was an agreement to do no more, than he was under both moral and legal obligation to do, without such promise. It created no new duty, nor added to its binding obligation. Even the actual payment of that sum after the debt was due, would not make a legal consideration for a promise of forbearance. Much less is a *mere promise* so to do, sufficient for that purpose. *Pomeroy* v. *Slade*, 16 Vt. Rep. 222. *Lynch* v. *Reynolds*, 16 John. Rep. 41. 3 Kent's Com. 146. *Russell* v. *Buck*, 11 Vt. 166.

It becomes entirely unnecessary therefore to refer to the contract made with Greenleaf, in relation to the one hundred dollars, and the agreement to pay twelve per cent. for the forbearance of that sum, for six months or longer, or to pass upon the various questions which have been urged as arising therefrom. The object of that testimony was to show a performance of the condition of that contract in the payment of the one hundred dollars, or that which was its equivalent; an excuse for its non-payment,

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so that this case might stand upon the same ground as if that money had been paid as agreed. Now grant this to be true, or suppose that sum had been paid as stipulated by the parties, or paid on the day and at the time the contract between Mattoon & Greenleaf was made, still the above authorities are conclusive in this State, that a payment of part of a debt, when the whole is due, is no consideration for a promise of forbearance for the remainder. It would have been no defense in an action on the note, nor be a ground of action if the note had been immediately prosecuted thereafter.

The charge of the court therefore was correct, that the contract stated in Mattoon's deposition was not sufficient to discharge the defendant as surety.

The judgment of the County Court must therefore be affirmed.

WARREN FELT *v.* SCHOOL DISTRICT NO. 2, IN ROCKINGHAM.

Book Account. Agent.

Where a School District employed the plaintiff to superintend the repairs of a School House, they knowing his habits and ability in this respect, it was held, that the plaintiff was entitled to recover for the work what it was worth to him, to do it.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows:

That plaintiff was chosen by the defendants to superintend the repairing of defendants' school house, and that plaintiff's account amounting to over $70, was for said repairs, and that the repairs made were necessary, that an ordinarily skilful and shrewd man would have made the repairs for $50, or $55. That the plaintiff acted in good faith in what he did do, and with as much skill and shrewdness as he exercised in the management of his own affairs, that his want of skill and shrewdness was known to the defendants when plaintiff was chosen agent. That plaintiff was present at

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the school meeting when he was chosen agent, and that said meeting at the time voted "to raise not to exceed $60, to repair said school house." The auditor found the sum of $66,29 of plaintiff's account to have accrued under his agency, and the sum of $6,17 for work done at the request of the prudential committee of said school district, after plaintiff had done all that he felt authorized to do under his agency. The county court render judgment on the report for plaintiff to recover both sums.

Exceptions by defendants.

A. Stoddard & G. B. Kellogg for defendants.

Insisted that plaintiff was restrained by the vote of the school district to the sum of $60, and that he could only recover for the amount the service was worth to the defendants. Also, that the meeting, October 27th, 1848, was not legally warned.

Stoughton & Baxter for plaintiff.

Insisted that plaintiff was entitled to recover such sum, as the expenditures and services were reasonably worth to the plaintiff. That the vote of the district simply limited the prudential committee in the assessment, and not the costs of repairing the school house. *Rogers* v. *Danby Univ. Soc.*, 19 Vt. 187.

That agent might do the work himself and recover in this form of action. *Sawyer* v. *Meth. Epis. Soc. in Royalton*, 18 Vt. 405, and 19 Vt. 187.

That plaintiff's want of skill, &c., was known to defendants at the time they appointed him agent, and the loss, if any, must fall upon defendants. Story on Bailments, § 435.

By the Court. It does not appear, that any exception was taken, either before the auditor, or in the county court, in regard to the regularity of the school meeting the 27th of October, 1848. We think that being the case, and no such question being on the face of the report stated by the auditor, it is too late to raise the objection here. If it had been taken before the auditor, it might have been obviated by proof, and the presumption must now be, that such would have been the case.

In regard to the right to recover for the work what it was worth to plaintiff to do it, we see no objection. He was employed by the

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district "to superintend the repairs of the school house;" he did it in good faith and with as much diligence and skill, as he did his own business, or as the district had any just ground to expect of him, knowing his habits and ability in this respect. We think when one employs an agent, knowing his incompetency, if he does his best, he is entitled to compensation. We understand the county court entered judgment for that sum and the other items allowed by the auditor, about which there is no dispute, (although we have not been furnished with any copy of the exceptions allowed by the county court.)

The plaintiff certainly was not bound to job the work and it does not appear, that if he had hired it done by others, it would finally have cost less. Men who are deficient in "shrewdness and skilfulness," as the auditor expresses the plaintiff's deficiences, are quite as likely to do work themselves reasonably cheap, as they are to get it done by others under their management and control.

Judgment affirmed.

Rutland and Burlington R. R. Co. *v.* Administrator of S. R. Wales.

Appeal from Commissioners. Motion to dismiss.

The plaintiffs took an appeal from the commissioners on the estate of S. R. Wales, but neglected to file, in the county court, a certified copy of the proceedings in the probate court, with proper evidence that notice of such appeal has been given to the adverse party according to the order of the probate court, as provided by statute, and also for the period of about six months no notice was given to the adverse party, of such appeal. The county court, on motion, dismissed the cause as being irregularly in court. Upon this state of facts, it was held, that if the court below, in the exercise of their discretionary power, have refused to retain the case, and have ordered it dismissed, that decision must be conclusive between the parties, and cannot be re-examined by the Supreme Court on exceptions.

Appeal from commissioners on the estate of S. R. Wales, deceased.

The administrator filed a motion to dismiss said cause, on the

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ground that the plaintiffs had not given notice of their said appeal and of the term of the court to which the same was taken, &c. It was conceded that said administrator had no notice of said appeal being taken, except, or until after said cause was entered in court, in April term, A. D. 1851, in the latter part of said term, and of said administration, save the entry on the docket.

The court decided that said cause was irregularly in court, the facts stated in said motion being true, and that the court had no power to retain said cause, and order notice to said administrator. The court entertained said motion, and dismissed the cause. Exceptions by plaintiffs.

C. Linsley for plaintiffs.

The appeal was regularly taken, but the proper notice was not given. This does not deprive a party of his right, as the law will not work a forfeiture, but continue the cause and order notice.

This works no injustice, at most, it only exposes a party to some inconvenience; while a contrary rule would sacrifice a just debt, for an omission to give notice.

The statute does not require any such construction by its terms, hence should not receive it.

Courts do not turn a party out of court, for an omission that can be cured. *Woodward* v. *Spear*, 10 Vt. 420. *Shelburn* v. *Eldridge*, 10 Vt. 123. *Gilman* v. *Thompson*, 11 Vt. 643. *Newton* v. *Adams*, 4 Vt. 437.

Stoughton & Baxter and *W. C. Bradley* for defendant.

The statute provides that the probate court shall direct the manner of notice to the adverse party, and that the order of the probate court shall be complied with, at least twelve days before the session of the county court, to which the appeal is taken. Comp. Stat. of 1850, p. 353 § 21.

In the case at bar, the probate court ordered that the appellants cause notice to be given to the administrator, by delivering to him the copy of the record of disallowance, the application for the appeal, and of the declaration filed in the probate court in said cause; and further ordered that the appellants cause said administrator to be summoned to appear before the county court, to be held at Newfane on the fourth Tuesday of April, A. D. 1851, at least

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twelve days before the session of said court. The appeal was entered, without complying with said order of notice.

The court have no power to retain said appeal, and order notice to be given, for the statute provides in express terms that the *notice shall* be given twelve days before the session of the court, to which the appeal is taken. It is, therefore apparent, that the legislature did not intend to leave the manner of notice, or time of notice in the discretion of the county court.

The case of *Woodward* v. *Spear*, 10 Vt. 420, arose under a statute which only provided "that notice to all concerned should be given." Slade's Comp. Stat. 333 § 7.

Courts may give a sensible interpretation to legislative expressions, which are obscure, but language which is clear they have no right to distort. *Pearce* v. *Atwood*, 13 Mass. 324.

It is a general rule in the construction of statutes, that where a positive duty is imposed, that such statute must be strictly complied with. *Miner* v. *Mechanics Bank of Alexandria*, 1 Pet. 64.

The statute is as positive, that the twelve days notice *shall* be given, as that a bond shall be filed when the appeal is taken, and for a failure to file such bond the appeal, would, on motion, be dismissed. *Bailey* v. *Woodward et al.*, 9 Conn. 388.

The opinion of the court was delivered by

ISHAM, J. The questions in this case arise upon a motion to dismiss. The proceedings upon which this application is made, is an appeal from the commissioners of claims on the estate of S. R. Wales. The appeal was taken on the 10th of October, 1850, to the county court to be held on the 4th Tuesday of April, 1851.

The Comp. Stat. p. 353, Sec. 21, 22, requires that the person appealing shall give notice of such appeal, and of the term to which it is taken, twelve days before the session of the court, and shall also file, in the court to which the appeal is taken, a certified copy of the proceedings in the probate court, together with the proper evidence that notice of such appeal has been given to the adverse party, according to the order of that court. In relation to all these requirements of the act, the case shows great neglect on the part of the appellants. After the appeal was taken, and for the period of about six months, no notice was given in fact to the adverse party, of such appeal, or of the term of the court to which it was taken, nor was a certified copy of the proceedings of the probate

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court, filed in the court to which the appeal was taken, until the latter part of the term, and no proper evidence had then been filed, that notice of such appeal had been given to the adverse party, as ordered by that court.

These are specific requirements of the act, and on failure to comply therewith, the 25th section provides that the claim of the party appealing shall be forever barred, and costs taxed for the appellee.

If we should consider that the provisions of this act were directory merely, and that the county court could retain the case, and order notice to be given, (*Woodward* v. *Spear*, 10 Vt. R. 420,) still, we entertain no doubt that the county court could exercise a discretionary power over the case, and for such neglect, might order the case dismissed. And we can readily perceive, that in many cases the exercise of this power is necessary for the attainment of substantial justice between the parties. Otherwise creditors may by such neglect, for a long period, delay the settlement of an estate, to its permanent injury. And in view of such consequences, the court might properly say, that as the party appealing has not conformed to the requirements of the act, they will not lend the aid of their discretionary power in sustaining proceedings where such neglect is injuriously affecting others. It is evident the party had no strict *legal right* to have the cause retained, and an order of notice made, for the statute in all its provisions had been neglected, and the case lay at the mercy and discretion of the court. To preserve their legal right, they should have conformed to the provisions of the act,—having lost their legal right, by their neglect, the court can exercise their discretion in retaining the case, or ordering it to be dismissed and refusing an order of notice. And if the court, in the exercise of their discretionary power, have refused to retain the case, and have ordered it dismissed, that decision must be conclusive between the parties, and cannot be reviewed by this court.

This was so ruled in the case of *State Treasurer* v. *Raymond et al.*, 16 Vt. R. 364, where on motion a case was dismissed from the county court, for the neglect of the administrator to enter his appearance as prosecutor, and it was held, that the dismissal was within the discretionary power of the court, and could not be re-examined by the Supreme court on exceptions. For this reason we think the judgment of the county court must be affirmed.

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JOSEPH STEEN, ADMR. *v.* ALBERT BENNETT AND CHESTER W. SARGEANT.

Probate Court. Decrees within its proper sphere conclusive.

The matter of appointing and removing administrators is a matter exclusively within the jurisdiction of the probate court, and a decree of this kind cannot be attacked in a collateral manner more than any other judgment.

The entry in the county court of the name of the second administrator is a matter of course, it is a thing which the county court could not legally refuse; and it is not important, that he should be designated *de bonis non*.

ASSUMPSIT upon a promissory note executed by the defendants to Seth Herrick in his life time.

Plea general issue, and trial by jury.

It appeared that the action was brought to the county court by Oshea Smith, administrator of Herrick, and in whose name it was entered. It further appeared that at the September Term 1850, the action stood on the docket of that term in the name of said Smith, administrator, as aforesaid, and that his counsel without leave obtained from the court for that purpose entered the name of Joseph Steen, upon the docket as administrator *de bonis non*.

That upon trial of the cause at that term, said Smith was offered as a witness for plaintiff, defendants objected and the court rejected him. The plaintiff then offered a certificate duly attested by the register of probate for the district of Marlboro', setting forth that said Smith had resigned the office of administrator of said Herrick, and that said Steen had been duly appointed by said probate court administrator *de bonis non* of said Herrick. The county court sustained the objection and excluded the testimony of said Smith.

It further appeared that said cause was continued to the April term, 1851, and on the docket of said term stood as when first entered, and the entry of said Steen did not appear.

At the September term, 1851, the case stood upon the docket in the name of said Steen, administrator, and *so stood* when the case came to trial, but was so without leave of court, and without consent of the defendants.

The plaintiff proved the execution of the note, and for the pur-

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pose of proving title of said Steen, offered the certificate aforesaid: to its admissibility the defendants objected:

1. That the probate court had no power to accept the resignation of said Smith as general administrator of said Herrick, nor to appoint a successor on such resignation.

2. If the court had such power in the premises; still the certificate was not the proper instrument of evidence to prove that the court had ever exercised the power in the manner that the certificate recited.

Both objections were overruled *pro forma* and the certificate went to the jury, who returned a verdict for plaintiff.

Exceptions by defendant. The certificate referred to was as follows:

"STATE OF VERMONT, }
"*Probate Dist. of Marlboro.* }

"Register's office, Brattleboro, Sept. 23, 1850.

"I hereby certify that upon the resignation of Oshea Smith as "administrator upon estate of Seth Herrick, late of Brattleboro, "deceased, this day filed in court, Joseph Steen is hereupon ap- "pointed upon the estate of the said deceased, and the said Oshea "Smith is discharged.

(Attest) F. HOLBROOK, *Register.*"

———— ———— for defendants.

Courts of special and limited jurisdiction must not only act within the scope of their jurisdiction, but it must appear on the face of their proceedings that they so acted, or their proceedings will be void. *Hunt* v. *Hapgood et al.*, 4 Mass. 117. *Sumner* v. *Parker*, 7 Mass. 78. *Clapp* v. *Beardsley*, 1 Aik. 168. *Walbridge* v. *Hall*, 3 Vt. 114.

2. The probate court is a court of special and limited jurisdiction, and derives all its authority from Statute. *Hendrick et al.* v. *Cleaveland*, 2 Vt. 329.

3. The statute confers no express power upon the probate court to accept the resignation of an administrator. Does it contain any implied power? Comp. Stat., Chap. 50, § § 13, 15 and 12. If the statute gives neither *express* or *implied* power to accept such resignation, then by so doing the court exceeds its jurisdiction, and the act or decree is void.

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4. It was decided in *Sears* v. *Dillingham et al.*, 12 Mass. 368— that an executor after probate of the will, accepting the trust and giving bond could not renounce the trust. We see no reason why the same rule should not apply to administrators.

5. The certificate is not the proper evidence of the facts it recites, unless made so by statute. Comp. Stat., Chap. 47, § § 3, 4.

We think it will not be contended that any thing short of the duly attested copy of the record would be admissible to show the acts of the court under Sec. 13 of Chap. 47, Com. Stat., and if a *removal* cannot be proved by a certificate of this description, we think a *resignation* of an administrator cannot.

——— ——— for plaintiff.

1. Steen was rightly and legally appointed. Comp. Stat. Chap. 50, § § 13 and 15.

2. Whether he was or not, neither this court, or the county court have any power in the premises. It was an act or decree of the probate court within its exclusive jurisdiction, unappealed from, therefore conclusive. *McFarland Adm'r.* v. *Stone*, 17 Vt. 165. *Administrator of Tryon* v. *Tryon et al.*, 16 Vt. 313. *Willard* v. *Willard*, 2 Mass. 124.

3. Steen having been legally appointed an administrator *de bonis non*, had a right to appear in the court below, and prosecute the suit commenced by the former administrator, without leave of that court or any other, it being given him by statute. Comp. Stat., Chap. 50 § 16.

4. The certificate was sufficient evidence of the appointment, and was rightfully admitted. Comp. Stat., Chap. 47 § 4. *Seymour's Adm'r.* v. *Beach et al.*, 4 Vt. 493.

By the Court. It has been repeatedly decided by this court, that a decree of the probate court, within its proper sphere of jurisdiction, is equally conclusive, as that of any court of general common law jurisdiction, and entitled to the same presumptions in its favor. The matter of appointing and removing administrators is a matter exclusively within the jurisdiction of that court, and if nothing more appeared in regard to the appointment of a new administrator, than the fact, it must be presumed that a vacancy occurred, in some legal mode, unless the contrary appear upon the face of

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the decree. Here it appears to have been upon the resignation of the former administrator, without assigning the ground of the resignation. As the decree was not appealed from, we must premise it was upon some sufficient and legal ground. A decree of this kind cannot be attacked in this collateral manner, more than any other judgment. This is not a matter in which the defendant has any interest, except to have the judgment a bar to any future suit.

The entry in the county court of the name of the second administrator, is matter of course; it is a thing which the county court could not legally refuse. And it is not important, that he should be designated *de bonis non*. Every administrator, after the first, is so in fact, and it is not important it should so appear of record.

The Compiled Statutes, Ch. 47, Sec. 4, expressly provides, that "certificates of probate, of administration, &c., may be given in evidence and have the same effect, as the letter of administration," i. e. it is sufficient to prove the appointment of the administrator, and that is all that is necessary in the present case. The rest, as we have seen, is matter of intendment, and legal presumption.

Judgment affirmed.

THE TOWN OF BRATTLEBORO v. THE TOWN OF STRATTON.

Liability of Towns under Chap. 91 *of Compiled Statutes.*

Lyman Ballard, a minor, whose legal settlement was in the town of S., was infected with the *small pox* while residing in the town of B., the selectmen of said town of B. provided physicians, nurses, and necessaries for said Lyman, and he was not of sufficient ability to pay said expenses; but his father was sufficiently able to pay them. It was held, in an action brought by the town of B. against the town of S. to recover said expenses, that the town of S. was *primarily* liable to the town of B. for whatever sum they had actually expended, in providing physicians, nurses, and necessaries for said Lyman.

This was an

ACTION ON THE STATUTE, brought by the town of Brattleboro to recover for expenses incurred by the selectmen of said town,

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in providing physicians, nursing, and necessaries, for one Lyman Ballard, who was at the time infected with the *small pox*.

It was admitted, that the said Lyman Ballard was a minor, under the age of twenty-one years, that his settlement was in the town of Stratton, and that his father, resident in said Stratton, was of sufficient ability to support the said Lyman, and pay said expenses, so incurred, and that said Lyman was not of sufficient ability.

The testimony tended to prove, that the *small pox* was introduced into Brattleboro by a Mrs. Hinckley, a resident of said village, who had been to New York; that she was taken sick with the disease sometime in November, or the early part of December, A. D. 1848, and that in the course of a few weeks, there were six or seven cases of the *small pox* and eight or ten cases of the *varioloid*, in the town, and most of them in the village of East Brattleboro; that soon after the disease appeared, the selectmen of the town made an arrangement for a place conveniently remote from inhabitants, to which infected persons might be removed; that said Lyman Ballard became infected with said disease, and the selectmen were duly called upon to take care of him, and he was sent to said place, so provided by the selectmen, and that a nurse, physician, and necessaries were provided for him.

The testimony further tended to prove, that no other person, than the said Lyman, infected with the disease of *small pox* or *varioloid*, was sent to said place so provided, but that the other persons so infected were permitted to remain with their friends, although they were sick at the same time with the said Lyman; the selectmen posting at the ends of the streets, notices of "SMALL POX;" that two of said persons so infected with the *small pox*, could not, in the opinion of the attending physician, have been removed to said place, so provided, without danger to life.

The defendants requested the court to charge the jury, that inasmuch as the father of the said Lyman was of sufficient ability to pay said expenses, the present action could not be maintained, but the court declined so to charge, but did charge the jury, that inasmuch as said Lyman was not of sufficient ability, the town of Stratton was liable to pay said expenses.

The defendants further requested the court to charge the jury, if they should find that there were other persons infected with the

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small pox or *varioloid*, in said Brattleboro, at the time when said Lyman was so infected, besides those persons whose lives in the opinion of the attending physician, would have been endangered by removal, and that said persons were not removed to said place, so provided by said selectmen, that then, and in that case, the town of Brattleboro could only recover such sum from the town of Stratton, as it would reasonably have cost, to have provided physicians, nursing, and necessaries for said Lyman, if all the persons so infected, other than those whose lives would in the opinion of the attending physician have been endangered thereby, had been removed to said place so provided, and had there been provided with physicians, nurses, and necessaries. The court declined so to charge, but did charge, that the town of Brattleboro were entitled to recover of the town of Stratton, whatever sum they had actually expended in providing physicians, nurses, and necessaries for said Lyman, but could recover nothing for providing said house, or as rent or any part of the rent or use thereof. Exceptions by defendants.

O. L. Shafter for defendants.

There was error in the refusal of the court to charge, as requested, that "inasmuch as the father of said Lyman was of sufficient ability to pay said expenses, the present action could not be maintained," and also in the charge actually given on that point.

The word "person" in the act, should receive a reasonable construction. *Hunt* v. *Lee et al.*, 10 Vt. 297. *Winchell* v. *Pond*, 19 Vt. 198. *Henry* v. *Tilson*, 17 Vt. 479.

And that it should be so rendered as to make the liability of the defendant, dependent upon the pecuniary ability of the *father* of the invalid, was virtually decided in *Bloomfield* v. *French*, 17 Vt. 79. *Berlin* v. *Morristown*, 20 Vt. 574.

That this service was rendered to the child at the father's request, is a conclusion of law. *Ambrose* v. *Kerrison*, 4 Eng. Rep. 361. *Chapple* v. *Cooper*, 13 M. & W. 252.

And if a question of fact, then it should have been left to the jury under proper instructions. *Gordon* v. *Potter*, 17 Vt. 348.

A. Keyes and *J. D. Bradley* for plaintiffs.

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As to defendants' objection, that the *father* was of sufficient ability, the defendants seem to have blended two statutes, which are incapable of amalgamation — the chapter on "the support and removal of paupers," and that on "the preservation of the public health."

These laws are made to *remedy evils* totally distinct; one of them to provide for and relieve pauperism, the other to prevent the spread of contagion.

By means totally distinct, one of them compels lineal ancestors and descendants mutually to relieve each other; for it was a moral obligation far older than the statute. In the other, the Legislature saw the injustice of burdening a relative with sanitary measures for the public safety, and placed the burdens on the towns.

Suppose the parent *able* and *desirous* of maintaining his minor child; cannot the selectmen, in their discretion, remove him, against the wishes of the parent? and if they do so, can they recover the costs of the parent?

And this view is perfectly consistent with compelling *the patient himself* to pay, if able; for it induces greater care to avoid the contagion.

The opinion of the court was delivered by

ISHAM, J. The plaintiffs have brought their action on the statute against the town of Stratton to recover expenses to which they have been subject for one Lyman Ballard, who at the time was a resident of Brattleboro, and infected with the small pox, but whose legal settlement was in Stratton.

We learn from the case, that Lyman Ballard was a minor, and in his own right, was not of sufficient ability to pay these expenses, but that his father was sufficiently able to pay them. And it is insisted that in consequence of his ability, and liability to pay for the necessary support and expenses of his minor children, this action cannot be sustained against the town, and that the ability of the father, should under a construction of this act, be considered the ability of the minor, or the person so infected.

The court charged the jury, that "*as the said Lyman* was not "of sufficient ability, the town of Stratton was liable to pay these "expenses." The statute, p. 515, in relation to cases arising un-

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der its provisions, is not only definite as to the person meant who shall be chargeable if of sufficient ability, but would seem to exclude any other construction. The first and second sections provide that if any person be so infected the selectmen shall immediately provide a place remote from the inhabitants, to which *such infected person* is to be removed, and make suitable provisions for such person. If the question be asked, at whose expense these provisions are to be made, the statute gives the answer. In the first place, it is to be done at the expense of *such person*, if of sufficient ability to pay the same, who is *infected with this disease*, and who is capable of communicating that disease to others, otherwise at the expense of the town in which such person has a settlement. It is therefore by express legislation that the words, "*such person if of sufficient ability to pay the same*," are confined to the person spoken of in this and the former section of this statute, and refers only to the *person so removed* by the selectmen and for whom personally these provisions were made. And though a minor, he is chargeable for these expenses, under this statute, as if for necessaries.

In an action, therefore, on this statute, we are not at liberty to extend this liability to others not embraced within the letter of the act, or within its spirit. For it was manifestly the intention of the Legislature to create a *primary liability on the town*, when the *person infected was unable to pay*. Whether the town of Stratton will have a claim against the father of this minor, or whether the town of Brattleboro could have brought their action upon a common law liability against the father, are questions we are not called upon to decide. We merely say, that in *this action*, founded upon *this statute*, the town, where the person so removed has his settlement, is by this statute made primarily liable, in case the *person infected* is unable to pay these expenses.

In the case of relief furnished to paupers, it has been held, that a town may support an action against a relative, where the relative would be liable at common law. 17 Vt. Rep. 79, *Bloomfield* v. *French*, and approved in *Woodstock* v. *Hartland*, 21 Vt. Rep. 563. And upon the authority of these cases it has been urged, that the plaintiffs could have sustained their action against the father of this minor, and that in consequence of this liability, the word "*person*" should include the father of this minor. The ob-

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jection to this is, as before remarked, that the statute will not permit us to extend this construction, for it is expressly confined to the person infected and removed. Besides, if the plaintiffs can sustain an action against the father upon such liability, it in no way will effect an action against the town upon this statute, where a direct and primary liability is created by the statute, where the person so infected and removed is unable to pay the same.

We entertain no doubt, therefore, that this action is well brought against the town where this minor has his settlement, and that the ability of the father to pay these expenses, has no tendency to show the ability of the minor to pay the same.

In relation to the extent of the liability of the town the court charged the jury "that the plaintiffs were entitled to recover "whatever sum they had actually expended in providing physi- "cians, nurses, and necessaries for said Lyman." This language is in the very words of the act, which not only declares the liability, but the extent of it. The propriety of this charge to the jury is not affected by the neglect of the plaintiffs in not removing all so infected to the same place. That was a matter resting entirely within the discretion of the selectmen of the town. They may if deemed necessary remove them to as many different places as there are persons infected.

But the liability of those who are removed, and of the towns where they have their settlement, is confined to such expenses as arise in providing physicians, nurses, and such necessaries as the nature of the case may require.

Such being the charge of the court we see no reason for setting aside this verdict. The result is, that the judgment of the county court must be affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF WINDSOR,

MARCH TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

STATE v. EBENEZER PADDOCK.

Information. License Law.

A single act of selling spirituous liquor, without license, constitutes an offense, under the statute of 1846. *State* v. *Bugbee*, 22 Vt. 32.

If an information sets forth the offense in the words of the act it is sufficient; and where an information for a violation of the license law, set forth that the respondent sold distilled spirituous liquors, in a less quantity than twenty gallons, and in quantity of one pint and more, it was held sufficient to prove the offense under each count, as specific as stated; and evidence that the respondent sold distilled spirituous liquors, in quantity of one pint or more, and less than twenty gallons, was all that is required.

And where the court, upon such an information, containing one hundred counts, "directed the jury to return a verdict of guilty for each act of selling;" it was held, that though the jury are the ultimate judges of both the law and fact, there

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was no error in the charge, as it must be considered an expression simply of the opinion of the court, of the law in the case.

Where an information, containing one hundred counts, each count having a distinct caption, and was only signed at the close of the last count, and upon the last page, but the pages were connected together, the information was held sufficient.

INFORMATION, in one hundred counts,—for selling without a license, foreign and domestic distilled spirituous liquors in a less quantity than twenty gallons, and in quantity of one pint and more.

The testimony on the part of the government, tended to show that the respondent, between the first day of January, A. D. 1850, and the thirty-first day of December, A. D. 1850, sold rum in various quantities, from one pint to two gallons, at various times, to the number of forty-nine or over.

The respondent requested the court to instruct the jury, that the government must prove the sale of the quantity alledged in the several counts. That proof of the sale of one pint would not support a count for the sale of one quart or one gallon, the proof of the sale of one quart or one gallon would not support a count for the sale of one pint. The court refused so to instruct the jury.

The respondent also requested the court to instruct the jury, that under the present information, they were not at liberty to find the respondent guilty of any breaches, except such as are contained on the last sheet of the paper presented as the information, (that being the only sheet signed, though the sheets were connected together.)

The court refused so to instruct the jury, but directed them to return a verdict of guilty, for each act of selling rum in any quantity less than twenty gallons, not exceeding in number, the counts, for selling rum, contained in all the sheets of the paper submitted as the information in this case.

To all which, the respondent excepts.

After verdict and before judgment, respondent also moved in arrest of judgment and sentence, for the insufficiency of the information, which motion was overruled by the court.

To which the respondent also excepts.

Washburn & Marsh and *Tracy, Converse & Barrett* for respondent.

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1. Every charge in an indictment must be sufficient to support itself. And the respondent should be informed, in the indictment, of the extent of the crime with which he is charged.

In the present indictment, he is charged, in one count, for instance, with selling one gallon of rum, and the jury "directed," (the jury not being permitted to judge of the law or fact,) to bring in a verdict of guilty on that count, even though the proof show a sale of but one pint. We think that herein there is error. 1 Chit. Crim. Law, 172, 229.

An indictment, or information, should state the offense charged with precision, "should be certain to every intent, and without any intendment to the contrary. 1 Chit. Crim. Law, 172.

2. The jury are the judges of the law in criminal cases. *State* v. *Croteau*, 23 Vt. 14. U. S. Law Mag. Sept. No., 1851, p. 257, 278.

No discretion was left to the jury in this case, of law or fact; they were but the mere automatons of the court, and signed such verdict as they were directed to. Such a course of proceeding is repugnant to the constitution of our State, and to the decisions of this court. Art. 10 of Constitution, Comp. Stat., p. 32.

3. Judgment should be arrested for the insufficiency of the information. There are but five perfect counts in the information in all.

It is not enough for a States' Attorney to fill up one sheet of blank counts in an indictment and sign one of the half sheets and then claim that twenty-one other half sheets unsigned are made perfect indictments by merely stringing them to the first half sheet that is signed.

This is dispensing criminal justice in quite too criminal a manner—and is establishing a precedent that may ultimately be productive of evil consequences.

The law which has always governed in matters of this kind, ought not to be further relaxed.

W. C. French States' Attorney.

It is well settled, not only in civil suits, but in criminal prosecutions, that a party is not bound to prove the allegations of *time*, *place*, *quality*, *quantity*, or *value* as alleged, unless they are descriptive. 1 Greenleaf Ev. § 61. 3 Starkie Ev. 1539.

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2. The fact, that each sheet has a distinct caption, is no objection, for it is no part of the bill, and may be rejected as surplusage. *State* v. *Gilbert*, 13 Vt. 647. *State* v. *Nixon*, 18 Vt. 70.

We are not aware of any objections to this information, which do not apply to the information. *State* v. *Bowen*. As to the information, *State* v. *Hogedon*, 3 Vt. 481. *State* v. *Gilbert*, 13 Vt. 647. *Clark* v. *Stoughton et al.*, 18 Vt. 50.

The opinion of the court was delivered by

ISHAM, J. Several questions have been raised in this case both on exceptions taken on the trial, and on a motion in arrest.

The statute upon which this information has been filed, provides, "that any person, who shall deal in the selling of distilled "spirituous liquors, and in quantities of one pint or more, and less "than twenty gallons, shall be deemed a retailer, &c."

It is objected, that this information does not charge the respondent, as being a *dealer* in the selling of spirituous liquors, but simply, that on specific occasions, he made such sales, for which this complaint is filed. This objection goes upon the ground, that the words in the act "*deal in the selling*," refer to the case of a regular and continued business and employment on the part of the respondent. Whereas, the information sets forth simple acts of selling, without having any connection with its being his regular and continual employment. This objection must be considered as overruled in the case of *State* v. *Bugbee*, 22 Vt. 32. Where the court held, that a single act of selling constituted an offense under the act. The objection, also, that the quantity sold, is set in the different counts, in figures, rather than words, must be considered as overruled in the case of *Clark* v. *Stoughton et al.*, 18 Vt. 50.

We think, also, the objection cannot prevail, that the proof of sale under each count, must be confined to the specified quantity as there stated. It is sufficient if the information sets forth the offense, in the words of the act, and any greater particularity is unnecessary, and so is consequently a greater particularity in the proof. It was sufficient to prove the offense under each count, as specific only, as it is necessary it should be stated, and evidence that the respondent sold distilled spirituous liquors, in quantities of one pint or more, and less than twenty gallons, was all that is required.

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The most important question arising in the case is upon the charge of the court. Wherein the case finds, that the court "*directed* the jury to return a verdict of guilty, for each act of selling."

And it is urged, that the jury, in cases of this character, are judges of the law and fact, and that under this charge, that right was taken from the jury. In criminal cases it is the duty of the court to aid and instruct the jury, and decide upon the law arising in the case. But the jury are the ultimate judges of both the law and fact, and this right cannot be taken from them.

To make this objection available however, it must appear affirmatively in the exceptions, that error exists, for every reasonable intendment will be made in favor of the charge of the court. If it appeared, that the court were requested to charge or inform the jury that they were judges of the law and fact, and that the court neglected or refused so to do, and directed them, as to the verdict they were to bring in, the exceptions would have been well taken. But as the matter now rests, that direction in the choice of the court, must be considered as an expression simply of his opinion of the law in the case, and which it was his duty to give, and as informing the jury, that it was their duty, to return such a verdict, without in any way controverting their ultimate right of exercising their own judgment in the case. For the want of positive error, affirmatively appearing in the exceptions, this objection is overruled. As is also the objection, that each page in the information is not signed by the informing officer.

The information being signed at the close of the last count, on the last page, and the different pages being connected together, as they are, we deem the information sufficient.

We think, however, the judgment must be arrested on the 6th count. And also the 84th—the 6th is held insufficient for being illegible; and the 84th, as not specifying the time when the offence took place—and that the respondent take nothing by his exceptions and motion in arrest, as to the remainder of the counts on which he was convicted.

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JAMES M. SUMNER v. ASA JONES.

Motion to dismiss. Appeal. Contract on the Sabbath.

An action upon a promissory note, originally above twenty dollars, and indorsed below that sum, but not below ten dollars, the *ad damnum* in the plaintiff 's writ being over twenty dollars, is appealable, and regard is to be had only to the note as originally given, and if the face of the note exceeds twenty dollars, the case is appealable.

A contract made and completed on Sunday, without any subsequent act or promise ratifying the same, is void.

But where S., on Sunday, sold a horse to J., for which J. on the same day gave S. his note, and afterwards made two payments upon the note, and retained the horse without offering to return the same, it was held, that these payments upon the note accompanied with the retention of the property was a subsequent ratification of the contract, and that S. was entitled to recover the balance due upon the note.

ASSUMPSIT. The action was commenced before a justice of the peace, and came to the county court by appeal. The defendant moved to dismiss the suit, on the ground that the same was not appealable. The county court overruled the motion, May Term, 1850. Exceptions by defendant.

The case was tried May Term, 1851. Plea *non* assumpsit and offset. Issue to the country on both pleas, and trial by jury. The plaintiff gave in evidence the note declared on, dated the 26th day of April, 1847, for the sum of $30, payable in six months from date with interest, and rested.

Upon said note, two payments had been made and indorsed, one the 25th day of March, 1848, of sixteen dollars, the other the first day of June, 1848, of five dollars.

The defendant gave evidence, under the general issue, tending to show that said note was made, executed and delivered on Sunday, between twelve and three o'clock, P. M., as part and in consideration of a trade that day made for the purchase of a horse by the defendant, of the plaintiff, and which horse the defendant still retains, and has never offered to return to the plaintiff. The defendant claimed and requested the court to charge the jury, that if they found the note to have been executed and delivered as the evidence tended to show, the plaintiff was not entitled to recover. The court refused so to charge—and did charge the jury that,

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though the note was made and delivered on Sunday, as the evidence tended to show, if the payments were made thereon by the defendant, at the times evidenced by the indorsements and the horse retained by the defendant, without any offer to return the same, it would be an affirmation and ratification of the note, and render it obligatory on the defendant, the same as if executed and delivered on any other day; and the plaintiff would be entitled to sustain his action on said note.

Exceptions by defendant. Proofs were offered under the plea in offset, but no exception was taken to the ruling and charge of the court on that part of the case. Verdict for plaintiff.

Tracy, Converse and Barrett for defendant.

The question in this case, is solely, whether the note is void or valid, as affected by the day on which it was made. See *Lovejoy* v. *Whipple*, 18 Vt. 379, for what this court held where the full consideration had passed from plaintiff without any offers to return or refund the same.

In *Adams* v. *Gay*, the case of *Blossom* v. *Williams*, and of *Williams* v. *Paul* are referred to as recognizing or involving the principle, that Sunday contracts may be on some other day subsequently affirmed, I cannot detect any such thing in the first named of 2d cases: see the cases 10 E. C. L. 60.

In *Williams* v. *Paul*, it seems to me that the doctrine is that a Sunday contract cannot be affirmed. See case 6 Bing. 653.

Suppose there had been *only* a special count on the original Sunday contracts, and the proof offered had been precisely what was in fact given, would the suit have been sustained?

In the present case, we submit, that the note was *void*. The case was tried and put by the court in the *declaration* solely on the *note*. The only competent proof is the note. Without the note, there is no proof to sustain the declaration. In order to render it valid for such a purpose, it must either become a new and *untainted* contract in precisely the same terms,—or the old note must be renovated by some act of affirmation having relation to the time when it was made, so that being still a note made on Sunday, the sin of it is made as no sin.

Is this a legal possibility? At any rate, we claim that nothing of this kind has been done in this case.

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If it has been done, then the sanctification of a Sunday contract is no more difficult than the slightest act which can avoid a statute bar, or affirm an infant's contract after becoming of age. This amounts to *universal salvation*, and Sunday contracts and Sunday contractors will have nothing to fear from judges in this world, whatever may be their hazards before the ultimate tribunal for man and his deeds.

Washburn & Marsh for plaintiffs.

The motion to dismiss was properly overruled.

1. The note declared upon was for $30,00: but payments had been made and indorsed, so that the amount due at the time the suit was commenced exceeded $12,00. The *ad damnum* was $50,00. The decision of the court below was in accordance with the decision of precisely the same question, by the Supreme Court, in *Tyler* v. *Lathrop*, 5 Vt. 170, and *Boardman* v. *Harrington*, 9 Vt. 151.

2. The charge of the court in reference to the affirmance of the contract made upon Sunday is precisely in accordance with the law, as decided in the case of *Adams* v. *Gay*, 19 Vt. 358,—a decision reflecting great credit upon this court, and which has rendered the case a leading one upon this subject in the United States. "A contract made upon Sunday is merely void until subsequently affirmed by mutual consent." In this case, the plaintiff *affirms the contract by seeking to enforce it; and the defendant has affirmed it, by twice making payments upon it and by retaining the property, which he received from the plaintiff.* A payment is an acknowledgent of the validity of the debt, and that it is still due.—It avoids the effect of the statute of limitations, which is a statute bar to the action, precisely analagous to the effect given to making the contract on Sunday. A Sunday contract is not void at common law, any more than a suit is barred at common law in six years. That which is evidence of a new promise in the one case must be the same in the other.

In *Sargeant* v. *Butts*, 21 Vt. 99, the decision in *Adams* v. *Gay*, is distinctly recognized as authority, and both are fully sustained by the case of *Williams* v. *Paul*, 6 Bing. 653. (19 E. C. L. 192.)

The opinion of the court was delivered by

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ISHAM, J. The first question arising in this case, is upon the motion to dismiss, and involves the propriety of the appeal granted in this case, from the judgment of the justice.

The *ad damnum* in the writ is laid at fifty dollars. The declaration is upon a promissory note of thirty dollars, on which two indorsements have been made, leaving a balance of over twelve dollars due thereon at the time of the commencement of this suit.—Without reference to the plea in offset, and the right of appeal thereon, we entertain no doubt that the plaintiff was entitled to an appeal from the judgment against him on the note.

The language of the Comp. Stat. p. 239, is too similar with that of the act of 1821, Slade's Comp. 139, to indulge the idea that there was any intention to alter the then existing right of appeal. And we must regard the decisions which have been made under the latter act, as giving a practical construction to the act under which this appeal was taken. In the two cases to which we have been referred from the 5th and 9th of Vt. Rep., it was held that no reference was had by the act of 1821 to the balance that might be due upon the note, but regard was to be had only to the note as originally given. And if the face of the note exceeded twenty dollars, an appeal should be allowed. This construction should be given to the act under which this appeal was taken. The motion to dismiss was therefore properly overruled.

The case then is narrowed down to the consideration of the question arising on the 2d bill of exceptions filed in the case.—From the facts there stated, we learn that this note was executed and delivered on Sunday, on the purchase of a horse on that day, bargained for and delivered. If the case rested on these facts alone, there can be no doubt that the defense would be complete, as being a contract of that illegal character, that no court would lend its aid to enforce. Its illegality arises from positive provisions of a statute which forbids under a penalty the exercise on that day of such employment and labor. It has been very properly observed, that in any case such a defense comes with ill grace from a defendant who personally has been engaged in such violation of the law—that it is to be borne in mind that the object of the statute is "the benefit of the public, not the advantage of the defendant." It is not for his sake that the defense is ever allowed. But as observed by Lord Mansfield in Holman *v.* Johnson,

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Cowp. Rep. 343, "It is founded in general principles of policy, that no court will lend its aid to one who founds his cause of action upon an immoral or an illegal act. If the cause of action arise *ex turpi causa*, or from the transgression of a positive law, the court will say, the plaintiff has no right to be assisted, they will not lend their aid to such a plaintiff. The parties will be left where they have placed themselves. The law will not interfere to relieve in the one case, nor enforce the contract in the other.

It is claimed, however, and on this question there seems to be a uniformity of decision, that contracts of this character are not rendered void, as being illegal at common law, but their illegality consists merely as being *mala prohibita*, not *mala in se*, and may be obligatory by the subsequent act of the parties. Thus it has been held that a contract is legal and will be enforced where the same was completed and perfected on another day, though its provisions and details were agreed upon and settled on the Sabbath.—This was so ruled under the English act, in the case of *Bloxsom* v. *Williams*, 3 Barn. & Cress. 232, and has been so expressly decided in this State in *Lovejoy* v. *Whipple*, 18 Vt. 379. It has also been held that where the contract has been completed on that day, so as to fall expressly within the prohibition of the act, yet it may be rendered obligatory by a subsequent promise of the parties to perform it; such promise is considered as a ratification of the contract, and when so ratified, the parties may have a remedy thereon. It was for the first time so ruled in the case of *Williams* v. *Paul*, 6 Bing. Rep. 653. That was a clear case of an executed contract on Sunday—the property was retained by the defendant, and afterwards on another day, the defendant promised to pay the plaintiff for the property. And it was held that the subsequent promise "was sufficient on the *quantum meruit*, or as a rat-"ification of the agreement made on Sunday." They would allow *no recovery to be had on the contract made on Sunday*, but treated the promise as creating a *new duty*, that would allow a recovery for the value of the property on the general counts. Whether this modification of the act, so made by judicial construction merely, is founded upon those principles of public policy which gave rise to the passage of the act, has been justly questioned. PARK, J., in that case uses this emphatic language: "That we regret to "be obliged to come to this conclusion, because it may have a ten-

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"dency to defeat the statute." And had the statute not been modified, there would have been no ground of complaint that it was inequitable or hard in its operation. No more, than such complaint can be made in any case, where one openly and intentionally violates the positive provisions of a penal law. The case, evidently adopted a principle never before recognized in the English courts, and neither the court or counsel referred to a case, in which the doctrine had been sustained, and in the case of *Simpson* v. *Nichols*, 3 Mees. & Wels. R. 239, the court express a doubt whether the cash of *Williams* v. *Paul* could be supported in law. It is to be borne in mind however, that that case proceeds only upon the ground of a retention of the property and a subsequent *express promise* to pay for the same, sufficiently definite and positive to be the substantive ground of an action, distinct from that made on the Sabbath.

In the case now under consideration, the contract has never been ratified by a subsequent express promise, and the important question arises, whether there are any facts found in the case that will produce the same legal result. The court charged the jury "that though the note was made and delivered on Sunday; yet if "the payments were made thereon by the defendant as indorsed, "and the horse retained by the defendant without any offer to re- "turn the same, it would be an affirmation of the note and render "it obligatory, the same as if executed and delivered on any other "day."

It is evident that the English authorities have not gone to this extent, for while it has been held, that a subsequent promise is sufficient to sustain a recovery for the value of the property; it has never been held in those courts that a promise can be *implied* from the mere fact of a retention of the property, or that subsequent payments are equivalent to an express promise. But on the contrary, CHITTY in his treatise on Con. p. 424, says "that "the law will not raise an implied promise from the mere fact "that the property had been retained by the defendant." And this rule as given by CHITTY has been directly decided on demurrer in the case of *Simpson* v. *Nichols*, 3 Mees. & Wels. Rep. 239, in which they held that the action could not be sustained, without a subsequent express promise. And even in that event, they doubted whether that, or the case of *Williams* v. *Paul*, could be

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supported in law. In relation to subsequent payments, although that may be sufficient to avoid the statute of limitations. Yet that circumstance has never been considered as creating a new substantive cause of action, or rendering obligatory a contract upon which no action could previously have been sustained, 2 Barn. & Cress. 824. 2 Esp. Rep. 628.

In this light, this subject stands upon the English authorities. Having adopted the principle in the case of *Bloxsom* v. *Williams*, they have not only manifested a disinclination, but a positive refusal to enlarge the means of avoiding the consequences of such illegal contracts by any act of the parties, short of a subsequent express promise to pay for the property, and then not by enforcing the original contract made on Sunday—but by giving that effect to the subsequent promise, that will enable the party to recover for the value of the property on the *quantum meruit*.

In this State, however, the cases have in many important particulars established different principles. The case of *Lyon* v. *Strong* fully sustains the cases of *Fennell* v. *Riddle*, 5 Barn. & Cress. 406, *Smith* v. *Sparrow*, 4 Bing. 84, and *Drury* v. *Defountain*, 1 Taunt. 134, in holding such contracts void. And the case of *Barron* v. *Pettes*, 18 Vt. 385, recognizes the doctrine of the case of *Bloxsom* v. *Williams*, requiring the contract to be perfected on Sunday to render it void.

In the case of *Adams* v. *Gay*, 19 Vt. 358, it was held, that *a refusal to rescind the contract* and return the property at the request of the other party was an affirmation of the contract, and rendered it obligatory, and in the case of *Sargent* v. *Butts*, 21 Vt. 99, in which there was a subsequent promise, it was held, that such promise ratified and rendered obligatory, an award made on Sunday, so that an action could be sustained on the award itself. And whatever may be the views of the English courts in relation to the case of *Williams* v. *Paul*, that case has been referred to in all the above cases, in some without the expression of any dissatisfaction, and in others by a direct approval of its doctrine. The principal of these cases must decide the present. The case in the 21st of Vt. Rep. will sustain this suit on the original contract, on a subsequent ratification of the same, and a refusal to have the contract rescinded followed by a retention of the property cannot be considered a stronger or more unequivocal ratification of such

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contract, than in this case, are the several payments which have been made on the note followed by the same act in retaining the property. Upon the authority of these cases, therefore, we must consider this note subsequently ratified, and that a recovery can be had for the balance due thereon. To this extent, we are carried by former decisions of this court, and from which we are not at liberty to depart. If there had been no subsequent payments on this note, and the case had stood upon the mere retention of the property, whether that circumstance alone would ratify the contract, we are not called upon to decide. Evidently it would not have that effect in the English courts.

The result is, the judgment of the county court must be affirmed.

Lydia H. Jenny v. Josiah H. Jenny.

[In Chancery.]

Right to Dower.

One cannot hold property which he receives as a mere gratuity, or as heir, if the property was so conveyed to him to defeat the wife of the deceased, to her right to dower, but he will be held liable in chancery to account for the property so received, and the widow will be entitled to one-third part of such property.

Appeal from the court of chancery. The orator alledged in her bill, that on the 20th day of June, A. D. 1825, she intermarried with Ephraim Jenny, and lived with him till 1834, when he deserted her, he having a large property and children by a former wife; that plaintiff had $300, and that said Ephraim conveyed all his property to Josiah H. Jenny, the defendant, with a view to defeat the plaintiff of her marital rights, and that since, Josiah H. has conveyed away all the property, and converted the same into money, and that he gave no consideration therefor, but in trust for said Ephraim, and to defeat said orator of her dower in her husband's estate.

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The defendant in his answer admits, that the marriage was in 1828, or 1829, and that plaintiff lived with said Ephraim until 1834, or 1835, and that they then separated, and soon after came together and lived together a year, and then said Ephraim hired plaintiff boarded at different places until his death; that orator only brought $50 of household furniture to said Ephraim, and that his property was not above $2000; denies all fraud in purchasing the property. Ephraim Jenny's first wife was the daughter of one Heald, and he died leaving his widow living, and all his property to said Ephraim on condition of maintaining the widow Heald; that she became dissatisfied, and the property was conveyed to Gowing and Dart to maintain the widow, and they continued to do it until 1835, and then gave it up; that defendant undertook to maintain the widow Heald, his grandmother, on condition of receiving the Heald estate and other property of said Ephraim, and also to maintain and support his sister, and that he did maintain them during their lives. That the widow Heald died in 1838, that defendant did not suppose this conveyance was to defeat the rights of plaintiff, and now insists he paid a full consideration and took it in all good faith. Admits that he has conveyed the land and received for it some $1300. That said Ephraim had a poor son, for whom he paid money and took a mortgage of his farm, and the defendant has since made further advances, and took a deed of farm for security; some $375, due in 1842. $260 of it, the property of Ephraim Jenny and accounted for to him and plaintiff, had no intention of defrauding the plaintiff, and is ready to account for the balance due to administrator of said Ephraim. Admits the purchase of said Ephraim at different times of personal property, but in every instance paid him therefor the full value of the same, and with no suspicion, that the conveyance was made to defraud the plaintiff, and does not believe such to be the fact. Admits that said Ephraim deceased in January, 1844, but denies his insolvency. Admits that he has done nothing to maintain the orator since the decease of the said Ephraim.

The orator's testimony tended to prove, that said Ephraim at the time of his death had no property except a watch; that defendant sold the Marsh mortgage to H. H. Henry, and that he also sold two cattle of value $18,50 each, which said Ephraim

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raised. That this suit is brought for the benefit of the town of Chester and the plaintiff. That defendant after purchase of farm worked at his trade, as a wheelwright, and said Ephraim carried on the farm, that defendant took no more charge after the sale of the farm than before; that he paid nothing for the farm, except maintaining Mrs. Heald and his sister, that plaintiff might have had $300, if she would have signed an acquittance. That defendant paid merchant's account against said Ephraim in 1839; that said Ephraim had large stock in 1838, worth some $400; that said Ephraim agreed to give plaintiff $800, if she would give him a bill, and that said Ephraim said that he wanted a settlement with plaintiff, and made offers for that purpose, and said he should not live with her more, and should give no reason, &c. The defendants offered no testimony.

By the Court. This case does not seem to have been referred to a master in the court of chancery, consequently we have no statement of the account between the parties, by which to determine how large a portion of the property, which seems to have come to defendant's hands and which he claims to retain, he has returned an equivalent for, and how large a portion of it, he must have received as a mere gratuity or as heir. We think it reasonable that the defendant should render an account of all the property which came to his hands once belonging to his father.

For all which he has paid a full and fair equivalent he will not be made liable. For all which he still retains, as a gift, or as heir, or which he has passed over to the other children as heirs, (all which we think is shown to have been done to defeat the plaintiff's right to dower,) for this, then, we think the plaintiff is entitled to a decree for one-third part.

The decree of the chancellor is reversed and the case remanded to the court of chancery to take an account and pass a decree for the orator for one-third of whatever sum the defendant shall appear to be liable for, the account to be as follows. The defendant to be charged with whatever sums appear either by the answer or testimony, to have come to his hands of the property of his father, either at the time, or before, and to be allowed to discharge himself by his own oath and other evidence, which shall show to the satisfaction of the master he paid a full and fair con-

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sideration for, or which he had *bona fide* passed into the hands of his father before his decease, but not by passing the same into the hands of the other members of the family, as a portion of his father's estate.

DAVID HUNTER *v.* WINDSOR AND WEST WINDSOR.

Liability of towns for the neglect of their town clerks. Declaration. Demurrer.

It is the duty of the town clerk to provide an *alphabet* or *index*, for the book of record used for recording evidences respecting titles to lands or real estate, and to keep and preserve the same for inspection and use, with the same truthfulness and care, that he is required to exercise in keeping the books of record, and when an injury has been sustained by any one, by reason of neglect in this respect, the town is liable under the statute.

But to enable a party to sue for such neglect, it must appear that the neglect to keep such an *alphabet* or *index*, was the cause of the damage he has sustained.

Where the plaintiff, in an action for the neglect of the town clerk to prepare and keep an *alphabet* or *index*, in order to show that the damage he sustained, was the result of, and caused by this neglect of the town clerk, set forth in his declaration the following averments or statement. "That upon the occasion of the negotiation and purchase of the premises by the plaintiff, and before completing the same, and for the purpose of assuring himself that the premises were free from incumbrance, he made an examination of the records of deeds in the town clerk's office, and by reason of there being no alphabet, index or reference pointing to that mortgage deed, or the record thereof, he was caused and led to believe, and did believe that there was no incumbrance upon the same, and that thereupon he completed and closed, on the 31st day of March, 1845, his purchase of the premises." It was held, on general demurrer, that the fact is sufficiently stated that the damage of the plaintiff was the result of, and caused by that neglect of the town clerk.

And it was also held, that it was not necessary to aver in the declaration that the plaintiff made a specific request for the *index* or *alphabet*.

And it was also held, that the words, "debts now due," in the act of 1848, dividing the town of Windsor into Windsor and West Windsor, should be held as synonymous with the word liabilities, whether arising *ex-contractu* or *ex-delicto*.

TRESPASS ON THE CASE, for the default of a town clerk. The declaration was as follows:

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"The towns of Windsor and West Windsor, (formerly constituting a sole town by the name of Windsor,) in the county of Windsor, are summoned to answer unto David Hunter of Windsor, in the county of Windsor, in a plea of the case, for that heretofore, to wit, at Windsor, in said county of Windsor, from the month of March, A. D, 1835, until the month of March, A. D. 1841, (during which period said present towns of Windsor and West Windsor constituted in law only one town, by the name of Windsor,) Edwin Edgerton was legal town clerk of said then town of Windsor, duly chosen and acting as such under appointment from said town. And on the first day of May, A. D. 1835, said Edwin Edgerton, being indebted to George Curtis and Edward Curtis in the sum of two thousand dollars, executed and delivered to said George and Edward, his, said Edgerton's, promissory note of that date, for the same sum aforesaid, payable to them or order in one year from its said date, with interest annually. And in order to secure the payment of said note according to its tenor, afterwards, to wit, at said Windsor, on the 10th day of June, A. D. 1835, said Edwin Edgerton and Susan C. Edgerton his wife, executed and delivered to said George and Edward Curtis their deed of mortgage of that date, of certain lands of said Edwin and Susan, in Windsor aforesaid, described in said deed, which was by them signed, sealed and acknowledged, in due form of law, therein conveying to said George and Edward Curtis, the whole and entire title to said lands, conditioned to be void upon the payment of said note, which deed was left by said George and Edward Curtis with said Edgerton, town clerk as aforesaid, for record, and was by him, as such town clerk, to wit, at said Windsor on the 11th day of June, A. D. 1835, duly recorded in the book of record of said then town of Windsor, as by said record, a true and attested copy whereof is here ready in court to be shown, will appear.

But the said Edgerton, then clerk aforesaid, did not then, nor did he ever make or cause to be made, nor was there ever made or kept by any one any alphabet or index or reference pointing to said deed or record thereof, during the period he was town clerk as aforesaid, nor till long after the 31st day of March, A. D. 1845.

And heretofore, to wit, on the 31st day of March, A. D. 1845, the plaintiff, not knowing of the existence of said mortgage deed to George and Edward Curtis, negotiated and purchased of Wil-

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liam White, then of said Windsor, a portion of the premises and estate embraced in said mortgage deed, said portion being bounded and described as follows, to wit: * * * * * * said White then holding title thereto, derived by deed of warranty executed by said Edgerton subsequently to the execution of said deed of mortgage to said George and Edward Curtis—and upon the occasion of the negotiation and purchase aforesaid, and before completing and closing the same, the plaintiff, for the purpose of assuring himself and being certain that said portion of said premises was free from incumbrance, made examination of the records of deeds in the town clerk's office of said town of Windsor, and by reason of there then being no alphabet, index or reference pointing to said mortgage deed or the record thereof as aforesaid, the plaintiff was caused and led to believe, and did believe then and there, as well he might, that there was no incumbrance upon said portion of said premises, and thereupon the plaintiff, to wit, on said 31st day of March, A. D. 1845, completed and closed his purchase of said portion of said premises of said White, and then and there, for the consideration of $400, paid by the plaintiff to said White, said White made and executed his deed of warranty of said portion of said premises in said last mentioned deed described, and delivered the same to this plaintiff, which said deed was signed, sealed and acknowledged by said White, all in due form of law, which said deed to the plaintiff was on the 31st day of March, A. D. 1845, lodged in the town clerk's office, in said then town of Windsor, for record, and was therein duly recorded, as by the plaintiff's said deed, here in court ready to be shown, will appear.

And the plaintiff avers, that it was the duty of said Edgerton, as town clerk as aforesaid, at the time of recording of said mortgage deed, to have made; and of every town clerk, successor of said Edgerton, to have made; and of said town at all times to have caused to be made and kept open to inspection and examination, an alphabet or index or some reference in the form of an index, attached to, or connected with the book of records wherein said mortgage was recorded, pointing to said mortgage and record thereof, whereby the same might be found.

And the plaintiff avers, that had he had notice of said incumbrance of said mortgage to said George and Edward Curtis, he should not have made said purchase, and that he did not know at

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the time of making said purchase, nor did he ever know or learn, or suspect the existence of said mortgage, until the commencement of the suit hereinafter named, brought by said George and Edward Curtis for the foreclosure of said mortgage.

And the plaintiff further avers, that afterwards, to wit, at Woodstock aforesaid, on the 13th day of October, A. D. 1845, the note secured by said mortgage remaining unpaid, said George and Edward Curtis commenced a suit by bill in chancery against said Edgerton and wife,—the plaintiff and divers other persons therein named to foreclose said mortgage—made returnable into the court of chancery, to be held at Woodstock, in said county of Windsor on the first Tuesday of November, A. D. 1845, which was duly served and entered in said court, and thereupon such proceedings were had, that at a term of said court held at Woodstock aforesaid, on the fourth Tuesday of May, A. D. 1849, said George and Edward Curtis obtained a final decree in their favor against the plaintiff and the other defendants in said suit, for the amount due upon said mortgage note with the interest, and the costs of said suit, making in all the sum of $3458,32—which sum, together with the accruing interest thereon, the plaintiff, together with said other defendants, was decreed to pay, on or before the first Tuesday of June, A. D. 1850, or be foreclosed of and from all equity of redemption in said mortgaged premises, as by the record thereof, duly authenticated copies whereof are here ready in court to be shown, will appear.

And the plaintiff avers, that by reason of the neglect and default of said Edgerton as town clerk, and of his successors in said office of town clerk, and of said then town of Windsor, in the manner aforesaid, he has sustained great damage. And in order to save the land so by him purchased as aforesaid from the operation of said decree, he (the plaintiff) has been compelled to pay and has paid a large amount, to wit, the sum of $500, and has otherwise been put to great trouble and expense in the premises, to wit, the further sum of one hundred dollars.

Whereby, by force of the statute in such case provided, an action hath accrued to the plaintiff to demand, have and recover of the said towns of Windsor and West Windsor (formerly Windsor) his said damages, sustained by reason of the premises as aforesaid, yet, &c."

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To this declaration the defendants demurred.

The county court May term, 1851,—PIERPOINT, J. presiding,—decided that the declaration is sufficient, and rendered judgment for the plaintiff. Exceptions by defendants.

Washburn & Marsh for defendants.

The cause of action does not survive against these defendants. The town of Windsor, against which the liability accrued, ceased to exist by the statute of Oct. 26, 1848; acts of 1848, p. 8. *Tileston* v. *Newman et al.*, 23 Vt. 421, and no liability for any past matter exists against the new towns thereby created, except such as is specially saved by the statute. The statute saves the liability for *debts*, using the words,—"*debts now due from the town of Windsor*,"—technically implying such operations as derive their binding force from contract, express or implied, and not extending to penalties imposed solely by statute, or to compensations to be made for *torts*, personal in their character, such as are sought to be enforced in this action. A bankrupt's certificate would not bar such claims; nor would such right of action pass to the assignee in bankruptcy, and no reason exists why the word "*debts*" should receive any other or more enlarged construction in this statute, than in the statutes relating to bankruptcy, or in other analogous statutes.

The omission to index the mortgage was not the neglect of a duty, on the part of the town clerk, for which the town is responsible. It was the duty of the town clerk truly to record the mortgage. Sl. Stat. 415 § 20.

And it has been decided by this court, in the case of *Curtis* v. *Lyman*,* that this requirement was complied with; that the deed *was truly recorded*. It is difficult for us to conceive how the town can be held liable for the *neglect* of the town clerk to do, what this court has decided *he in fact did*.

Tracy, Converse and *Barrett* for plaintiff.

1. Towns are liable for "*neglect*" or "*default*" of town clerks, &c.

Do the matters alledged in declaration show a "neglect" or "default" which will make town liable? R. S. 89 §§ 29, 30. Slade's Ed. 420.

* The opinion in the case of *Curtis* v. *Lyman* was delivered by HALL, J., and follows the opinion of Judge ISHAM in this case.

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The statute of 1779 provides that a "book or books with an in-"dex or alphabet to the same, suitable for registering deeds and "other evidences respecting title to lands, and a book or books for "recording the proceedings of town meetings, shall be provided "by town clerk, &c. And it is hereby made the duty of the town "clerk or register truly to record all deeds, &c."

The same statute provides a penalty for a neglect and refusal to record. p. 415.

By the Rev. St. it is provided that the town clerk "shall also "furnish and keep in his office, contained in, or annexed to, the "books of record for deeds and other evidences concerning real es-"tate, a suitable index of reference to every instrument on record "in such books." p. 89 § 30. Comp. Stat. 116.

The neglect to procure an "*index or alphabet*" or furnish one, is distinctly alledged.

It is also alledged that the plaintiff examined the records, to see what was the state of title. "Did not find the mortgage to Curtis, "because there was no index or alphabet."

By means of the neglect to prepare such index, he lost his title, or was obliged to redeem the Curtis mortgage.

No doubt then, the injury to the plaintiff was occasioned by the neglect to furnish the index.

That the neglect to furnish the index, is a "*neglect*," is beyond doubt. And why will not the town be as liable to pay all damages arising from this neglect, as any other neglect—as much as neglect to "*record?*"

The index is practically of as much importance as the recording. It was so determined in the case of *Curtis* v. *Lyman*, decided in this court, not reported.

2. Did the division of the town of Windsor, in 1848, annihilate this claim? Acts of 1848, No. 7.

The act expressly provides for all debts then due from the town.

The fact that it was an unliquidated claim, can make no difference.

By the record, "*debt*" as used in the statute referred to, is meant *liabilities or claims* of every description. Nothing short of that could be intended by the Legislature.

If, however, it was the intention of the Legislature to relieve the town of this or similar liabilities, it was beyond their constitutional power to do so.

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The fact that an *action on the case* was prescribed as the remedy in this case, can make it no different from what it would have been, had debt been the action.

It was equally beyond the power of the Legislature in both cases to "*impair*" or abrogate the liability of the town.

Had no provision been made in the act, for the debts and liabilities of the town, they would have remained unimpaired.

The town of Windsor was not *annihilated*, but it was simply *divided.*

The Legislature had no power to dissolve or annihilate the political existence of the town so as to impair the rights of any one.

They did not attempt to exercise any such power.

This question was directly settled in the case of *Stone* v. *Windsor and West Windsor*, last June term of this court.

The opinion of the court was delivered by

ISHAM, J. The questions in the case arise upon a general demurrer to the declaration.

The action is in case upon the statute, in which the defendants are sought to be charged, in consequence of the negligence and default of the town clerk of Windsor, previous to its division by act of the Legislature in 1848.

The particular matter of default or negligence, of which the plaintiff complains, is the neglect of the clerk to make and keep an *alphabet* or *index*, annexed to the book of records, and referring to such deeds or instruments as are on record therein. And for the neglect of the clerk in this particular, this action is brought.

It is insisted by the defendants that it was no part of the official duty of the clerk to make such index, and that in this case, his duties as town clerk were fully discharged, in recording at length upon the records of the town, the mortgage deed of Edgerton and wife to George and Edward Curtis, although he did neglect and omit to enter the same on any alphabet or index, belonging to the book of records. And the question presented on this demurrer is, whether that is an official neglect on the part of the town clerk, for which the town is responsible.

The act of 1797, Slade's Comp. 414, Sec. 20, provides "That a "book or books *with an index or alphabet to the same*, suitable for "registering deeds and other evidences of title to lands, and a

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"book or books for recording the proceedings of town meetings, "&c. shall be kept in each town in this State, and which are to "be provided by the clerk, at the expense of such town, and it is "made the duty of the town clerk truly to record all deeds and "conveyances, writs and executions, where by law it becomes "necessary." The intention of the Legislature in these provisions is very evident, and it is the duty of the court to give such construction to the act as will carry such intention into effect.

Two different set of books are to be kept; one exclusively for recording evidences respecting titles to lands, *with an index or alphabet to the same*, the other for recording the proceedings of town meetings, &c. and with which no index is required. It may with propriety be asked, for what purpose is the clerk required to procure an alphabet or index, in connection with the book of records for recording evidences of title to real estate. Certainly it was not for the purpose of effecting *constructive notice* of the execution and record of deeds, for that object is accomplished by recording the deeds at length upon the records, although there has been a neglect and omission to index or alphabet the same. This was so ruled by this court in the case of *Curtis* v. *Lyman*, on a bill of foreclosure brought on this same mortgage deed; and the plaintiff and others, who subsequently became interested in the premises included in the mortgage deed, were charged with constructive notice thereof, and their title was held subject to that incumbrance.

Evidently, therefore, that whole provision is a singular instance of idle legislation, if the Legislature did not intend that the *index or alphabet* should be kept in each town, for the definite object and purpose of furnishing an easy and accessible facility, by which any person in the exercise of reasonable diligence, can discover and obtain *actual notice* of the existence of any deed, or mortgage, or evidences of title to real estate thereon, so that all persons who may become purchasers thereof, or who may wish to make advances on such security, may obtain actual knowledge of the title and condition of the property. That such an index or alphabet is of practical importance, that it contributes, and is even rendered essential, as a facility for such discovery and notice, must be within the experience of every one conversant with such records. And it is not to be presumed, that such an important facility for the discovery of the true condition of real estate was overlooked or disregarded by the Legislature.

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The act, therefore, was designed to effect two objects, in the first place, providing the means, and furnishing facilities for the discovery of, and obtaining *notice in fact* of such deeds, mortgages and evidences of title, as are placed on the records. And in the second place, to furnish the proper evidences of constructive notice, when all means before provided, have failed in giving actual notice; and when an injury has been sustained by any one for a neglect in either respect, the town is liable under the statute.

The statute imposes the duty upon the town clerk to record all deeds, conveyances, writs and executions, and to keep *such books* within his town, and to record the proceedings of town meetings. It is true that in the specific enumeration of matters to be recorded, no mention is made of the index or alphabet. But the general provision is in these words, "It is made the duty of each town "clerk in this State, to keep *such books* within his respective town." The words "*such books*" evidently refers to all *those* which it was made the duty of the town clerk to procure at the expense of the town. And in specifying those books, the *index or alphabet* is particularly mentioned.

On this subject the intention of the Legislature is too obvious to be mistaken, and we conceive it would be a great departure from judicial duty to defeat that intention by an illiberal or technical construction. To carry into effect an intention so manifestly spread upon the face of the act, the court, if necessary, would be warranted in departing from the ordinary meaning and use of words, and would disregard the grammatical construction, for the object of the act is salutary, and necessary for the safety of those who are intersted in the evidences of title to real estate.

We have no hesitancy, therefore, in deciding that it was the duty of the town clerk, to provide such an *alphabet or index*, and to keep and preserve the same for inspection and use, with the same truthfulness and care, that he is required to exercise in keeping the books of record.

To enable the plaintiff, however, to sue for such neglect, it must appear that he has sustained a damage thereby, or in other words, it must appear that the neglect to keep an *alphabet or index*, was the cause of the damage he has sustained, and as this matter arises upon demurrer, such averments should be made in the declaration.

The declaration contains the following statement of facts, and

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which are admitted by the demurrer; that the mortgage deed of Edgerton and wife, to George and Edward Curtis, was executed and recorded on the 11th day of July, 1835, but that the clerk has never made, and kept for inspection and examination an alphabet or index, referring to the deed or its record, until after the plaintiff had become a purchaser of those premises; and that as such purchaser, he never had actual knowledge of the existence of that incumbrance, until the bill in chancery, to foreclose the premises on the Curtis mortgage, was served upon him. It is also stated in the declaration, that on that bill a decree was obtained, and that to protect his property under his purchase, he has been compelled to pay and advance the money for which, as damages, this suit is brought. In the statement of the plaintiff's cause of action, in his declaration thus far, we find admitted by the demurrer, the neglect of the clerk to make and keep an alphabet or index to the book of records, on which is recorded the evidence of title to real estate; and also, the damages which the plaintiff has sustained, in consequence of not having *notice in fact* of the existence of the Curtis mortgage. In order, therefore, to show that the damages which the plaintiff has sustained, *was the result of, and caused by this neglect of the town clerk*, the declaration contains the following averments or statement: "That upon the occasion of the negotiation and purchase of the premises by the plaintiff, and before "completing the same, and for the purpose of assuring himself "that the premises were free from incumbrance, he made an examination of the records of deeds in the town clerk's office, and "by reason of there being no alphabet, index or reference, pointing to that mortgage deed, or the record thereof, he was caused "and led to believe, and did believe that there was no incumbrance "upon the same, and that thereupon he completed and closed, on "the 31st day of March, 1845, his purchase of the premises."

The sufficiency of these averments and statement, it should be observed, arises upon general demurrer; and it is sufficient, if those facts are substantially stated, which will give a right of action, without regard to the form of statement, for if the statement is informally alledged, that can only be reached by special demurrer. On this demurrer therefore, we think the fact is sufficiently stated, that the damage of the plaintiff was the result of, and caused by that neglect of the clerk. It is not stated that the plaintiff made a

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specific request for the index or alphabet. If such a specific request was necessary, it should have been averred in the declaration. But we do not think such a specific request is necessary in any case. The plaintiff had a right to make a personal examination of the record for himself, and he was under no necessity of making known the object of such examination. He possibly might have deemed it imprudent to make such disclosure. And no such duty or obligation rests upon any one; every person has a right to a personal examination of such records, and for that purpose, may call upon the clerk for the book of records, containing the evidences of title to lands, and upon such general request, it is as much the duty of the clerk to submit to his examination, and use the *index or alphabet* to such books of record, as the books themselves. And if he neglects so to do, and damages have resulted therefrom the town is responsible therefor. Upon that part of the case therefore, we think the declaration is sufficient, and sets forth a good cause of action.

Another objection has been urged on this demurrer to this declaration, and equally effecting the right of action. It is insisted that whatever may have been the former liability of Windsor on this matter, that liability was removed and lost by the division of the town under the act of 1848. This we can but feel, is giving rather a severe effect to the operation of that act, particularly as it regards third persons, who were not as inhabitants of the town interested in such division. And that no court would feel disposed to give such effect to the act, unless compelled so to do, by most unequivocal legislation, even if there were no constitutional objections in the way. It is also insisted, that by that division, the corporate existence of Windsor, as it existed when this cause of action accrued, has been lost and its charter vacated; and that with it were lost all claims and causes of action, except such as have been particularly excepted from its operation.

The statute making that division, saves the *liability for debts now due from the town of Windsor* and specifies the manner and proportion to be paid by each town respectively.

In this provision, the Legislature were evidently settling the terms of that division, and disposing of matters that might be in controversy between them after the division was effected. And it is not reasonable to suppose that they were simply providing

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the manner in which debts arising *ex contractu* should be apportioned between them, for there may have been, and it is not unreasonable to suppose that there were other liabilities existing arising *ex delicto*, which should be proportionately paid by the respective towns. As claims against the town for neglect in keeping roads in repair, neglect of constables, &c. That the Legislature intended, under that form of expression, to include the whole liabilities of the town of Windsor, as it stood when the division was made, is very apparent. And the words, "debts now due," should be held as synonymous with the word liabilities, whether arising *ex contractu* or *ex delicto*.

That clause of the act, saves all such liabilities of the town of Windsor, as it then stood, from the operation and effect of the division, and those liabilities still rest upon the territory, and inhabitants of Windsor and their successors, the same as if that division had not been made.

We are not therefore, called upon to investigate the question whether for any purpose that division vacated the old charter of Windsor and created two new towns, with new charters, as by an express saving clause the matter for which this suit is brought, is excepted from its operation, and unaffected by the division.

The result is, that the judgment of the county court is affirmed.

George and Edward Curtis *v.* Job Lyman and Others.

[in chancery.]

Where the mortgagee left his mortgage with the town clerk for record, and the clerk recorded the same at length, and so certified upon the mortgage, but made no alphabet or index of the said mortgage, it was held, that the mortgage was properly recorded within the meaning of the statute, and that the alphabet or index constitutes no part of the record, and the mortgage became an incumbrance upon the land from the time it was transcribed upon the record.

This case was decided in Windsor county, March term, 1849, and the opinion was sent to the Reporter, without any of the papers in the case, by Judge Isham, with the suggestion that the

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same be reported, as it is referred to in the preceding case, *Hunter* v. *Windsor and West Windsor.*

The facts sufficiently appear in the opinion of the court, which was delivered by

HALL, J. This is an appeal from chancery. The bill is for the foreclosure of a mortgage in common form. The complainants are the mortgagees; one of the defendants, Edgerton, being the mortgagor, and another defendant, Lyman, being a purchaser under Edgerton.

The facts found and about which there is little or no controversy, are these:

Edgerton being indebted to the plaintiffs by note in the sum of $2000, mortgaged to them certain lands, which mortgage was transcribed upon the book of records of the town on the 11th of June, 1835, and duly certified as recorded; but no reference to the record was entered upon the alphabet. Subsequently, the defendant Lyman, without actual notice of the mortgage, and before the record of it was alphabetted, for the consideration of $5000, purchased the same land of the mortgagor, his deed being recorded Feb. 7, 1839. Both the mortgage and deed were received for record and certified as recorded by Edgerton, the mortgagor, who from March, 1835, to March, 1841, was the town clerk; and the reference to the mortgage was first entered on the index by the subsequent town clerk in August or September, 1844. There is no evidence that the mortgagees had any knowledge of the neglect of the town clerk to enter their mortgage on the alphabet, and they must be taken to be ignorant of it. No other objection is made to the record, but the want of an index to it, and it is to be treated as having been in all other respects regular and sufficient.

The question is, whether the neglect of the clerk to index the mortgage, shall render the record of it invalid, so as to postpone the title of the mortgagees to that of the subsequent purchase.

The determination of this question must depend upon the construction of the statutes of 1797 in relation to the recording of conveyances, which statutes were in force when both deeds were lodged in the town clerk's office.

The 5th section of the act for regulating conveyances of real

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estate, specifies the several requisites of such conveyances. It declares "that all deeds or other conveyances of any lands, tene-"ments or hereditaments, lying in this State, signed and sealed "by the party granting the same, having good and lawful author-"ity thereunto and signed by two or more witnesses, and acknowl-"edged by such grantor or grantors before a justice of the peace, "*and recorded, at length, in the clerk's office of the town, in which* "*such lands, tenements or hereditaments lie*, SHALL BE VALID TO "PASS THE SAME, without any other act or ceremony in law "whatever."

If the language of this statute were to be taken in its ordinary sense and serve to control our decision, there would seem to be but little doubt of its effect. There would in regard to the mortgage appear to have been a full and literal compliance with the words of the statute. The mortgage had been *transcribed* at length in the town clerk's office, and by the proper officer, and duly certified as recorded; and that is what is commonly understood as constituting a record of it.

It is, however, said, that although the ordinary signification of the word recorded may be satisfied by what was done in this case, yet, that the act regulating town meetings and the choice and duty of town officers, is to be construed as providing an additional requisite to the record of conveyance — in other words, as in effect declaring that a deed shall not be considered as recorded, until an index to it is entered upon the alphabet.

No such language is, however, found in that act, nor do we think any intention to engraft such additional requisite upon a deed can be fairly implied from the language used. The object of the act is to point out the duty of the clerk, not only in the making of a proper record of conveyances, *but also in furnishing facilities for* their discovery, examination and use by all persons interested in them. And to secure the due performance of these duties the clerk is made liable to the party injured for the neglect of them, and to the security of the party injured is superadded, by a subsequent statute, the responsibility of the town. The index or alphabet, which it is the duty of the clerk to have annexed to his book seems to be one of the facilities to be used in making search for the record, not a part of the record itself. It is his duty to have an index, and to enter upon it a proper reference to

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every record of a conveyance, and for any neglect to do so, he and the town are liable for the damages any person may suffer by it. But it is not certain that any one will be injured by the neglect, and therefore the record itself should not be void. The clerk may know the place of the record and may point it out to all who may wish to examine it. A purchaser may take his deed relying alone upon the representations or covenants of his grantor, without desiring to examine the records. An index, or the want of it, would seem to be of no importance to him. So if without making any search or causing any to be made, a purchaser should rely solely on the representations of the clerk, that the title was clear, and those representations should be knowingly false, it is perhaps questionable whether he could be said to be injured by the want of an index. That would only seem to become important when an actual search of the records was desired to be made. The legitimate ground of complaint in such case would probably be the fraudulent representations of the clerk.

There are many practical difficulties in the way of making an index to the record an essential requisite to the validity of the title. The statute provides for an "index or alphabet." Are the two words used synonomously? Or have they here, as they often have, different meanings? Is it indispensable that the index should be in alphabetical order? If so, shall the name of the grantor or the grantee be alphabetted? Or shall there be two indexes, one of each? Must the Christian name be written at length, or will the initials be sufficient? It is obvious, that if an index is held to be an essential part of the record, the way will at once be opened for a serious and embarrassing course of litigation in settling by judicial construction, what shall constitute a sufficient index, and what departures from a prescribed form shall render the record invalid. And all this, perhaps, when there has been no real injury to any one in consequence of a defective index.

But if from the want of an index, or a proper entry upon it, the record is to be inoperative shall it be held absolutely void? If the reference to it upon the index be not made the instant the record is completed, is the record a mere nullity? Or may the record be restored and made operative by a subsequent entry upon the index? If so, when does the record take effect? If

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from the entry on the index, how is the true time to be shown? Shall the clerk certify upon the record the time of the entry? That has never been done. The true time the record takes effect must then in all cases be left open to be proved by parol! In this case it appears by the evidence of the town clerk, that the plaintiffs mortgage was first alphabetted some time in August or September, 1844.

This evidence is quite too loose and uncertain, from which to determine when a record is to become operative, as all parol evidence necessarily must be. It is obvious, that if an entry of a deed upon the index is held to be essential to the validity of the record, that it must necessarily lead to inextricable confusion and uncertainty in regard to the priority of conveyances. Indeed, the difficulties in the way of a decision to that effect, appear to us to be insurmountable. On the other hand, we do not perceive but that the object of the statute's providing for the recording of deeds will be fully answered by leaving any body, actually sustaining an injury from the want of an index, or by a defective one, to his statute remedy against the clerk and the towns.

The case of *Sawyer* v. *Adams*, 8 Vt. R. 172, has been relied upon by the defendants' counsel, as having an important bearing upon the question in this. But our decision does not conflict with the law of that case. The facts in that case were peculiar. From them, the court found that there had been in effect no record of the deed upon the book of records. Chief Justice WILLIAMS, in delivering the opinion of the majority of the court, puts the case upon that ground. He says "that recording means the copying the instrument to be recorded into the public records of the town, in a book kept for that purpose, by or under the superintendence of the officer appointed therefor." This, the court held, had not in that case been done. But it had clearly been done in this case. The deed was copied by the town clerk into the proper book, in the proper place, and duly certified as recorded, which would doubtless have been held by the court at that time, to have been sufficient.

We are all agreed that the proper office of the index is, what its name imports, *to point to the record*, but that it constitutes no part of the record; and we must consequently hold, that the plaintiff's mortgage became an incumbrance upon the land from the time it

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was transcribed upon the record, and that the defendant Lyman took his title subject to it.

The result is, that the decree of the court of chancery is to be affirmed, with directions to that court to fix upon a time for redemption and to carry this decree into effect.

Solomon Downer *v.* Christopher C. Rowell.

Trover. Conversion. Evidence.

If A. sell to B. sheep, that B. had before leased to A., and at the time of the sale B. knew that they were the same sheep he had leased A., it is not a conversion of the sheep so sold, and B. cannot maintain trover against A. for the sheep.

The old rule, that the witness must be able to swear from memory, is now pretty much exploded, and all that is now required is, that the witness shall be able to state, that the memorandum is correct; he may then read it.

Trover for sheep and wool. Plea, the general issue and trial by jury.

On trial the plaintiff introduced testimony tending to prove, that on the first day of November, A. D. 1840, he delivered to the defendant and one Jabesh Hunter, since deceased, one hundred and eleven sheep, and took their receipt in writing for the same, by the terms of which they were to redeliver the same sheep, or others in their stead, as good as they were, in three years from the date of said receipt, and pay yearly fifty-five and one-half pounds of wool, as rent for the same. The defendant also proved a demand of the sheep and wool in May, 1847, previous to the service of the writ.

The defendant offered evidence tending to prove, that plaintiff purchased of him in the fall of 1841, a flock of sheep, and that this flock included all the sheep that he then had, and that among this flock, so purchased by the plaintiff of the defendant were the same sheep, or a part of the same so leased to defendant and said Hunter, in the fall of 1840. That the plaintiff at the time of the purchase of said sheep paid the defendant the money for all said sheep, except a small sum for which he gave defendant his note.

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The defendant offered Andrew Tracy, one of the counsel for the plaintiff, as a witness, to prove the testimony of one Bani Udall and one Joab Dimick, witnesses who testified in this case on a former trial, but have since deceased. Mr. Tracy stated, that after having examined his minutes taken on said trial to refresh his memory, that he could from recollection give the substance of the testimony of said Udall *in chief*, but that he could not state the substances of the testimony of said Udall *in chief* and *on cross examination*, without reading from his minutes taken on said former trial. To this the plaintiff objected, but the court overruled the objection and allowed said Tracy to state by reference to his minutes the testimony of said Udall and Dimick.

The plaintiff requested the court to charge the jury, that if they found that the plaintiff did in fact receive from the defendant, in the fall of 1841, the same sheep, or any of the same, so leased to the defendant and said Hunter in November, 1840, still, if the plaintiff purchased said sheep and *paid the defendant* therefor, that the defendant, by selling said sheep and receiving pay therefor was guilty of a conversion of the same, and that the plaintiff was entitled to recover. The court declined so to instruct the jury as requested, but did instruct them that if the defendant sold said sheep or any part thereof to the plaintiff, and the plaintiff at the time of such purchase knew that they were the same sheep so leased to the defendant and said Hunter, that the plaintiff was not entitled to recover for such sheep as were so sold and delivered back to plaintiff. The jury returned a verdict for defendant.

To the charge of the court, and the admission of said Tracy as a witness, the plaintiff excepted.

Tracy & Converse and *W. C. French* for plaintiff.

1. The court erred in allowing Mr. Tracy to read his minutes. The rule is, that a witness has a right to *refresh his memory* by the use of a written instrument, memorandum, or entry in a book. But after having so refreshed his memory, he must be able to state the facts *from recollection*. 1 Phil. on Ev. 226. 1 Greenleaf on Ev. § 436. *Sandwell* v. *Sandwell*, 3 T. R. 752. 8 East 284, 289. 1 Cow. & Hill's notes, 528.

In some cases, where a witness is enabled to state that he *knows the contents of the writing to be correct*, although he at the

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time has no independent recollection of the facts stated in it, yet he is permitted to testify. Further than this the rule has never been carried; and in such cases, the writing is not made *evidence of itself.* 1 Greenleaf on Ev. § 437 and cases cited. Cowen & Hill's notes to Phil. Ev. § 528, p. 750.

It is a well settled rule, that the witness must be able to state the *whole* of the testimony of the deceased witness; not only his examination *in chief*, but his *cross examination.* 1 Greenleaf on Ev. § 165. *Wolf* v. *Wyeth*, 11 S. & R. 149. *Com.* v. *Richards*, 18 Pick. 434.

2. The sale of the sheep, by Rowell, was a conversion. *Grant* v. *King et al.*, 14 Vt. 367. *Swift* v. *Moseley et al.*, 10 Vt. 208.

The case is made to turn upon plaintiff's *knowledge*, that they were the same sheep. In analogous cases it is held, that this makes no difference, as when property is *distrained* and the owner is compelled to pay money to redeem it. 6 T. R. 298. 1 Swift's Dig. 538.

This case is not like that class of cases in which *acquiescence is presumed*, where the rights of *third persons* are concerned; as when a person stands by and allows another to sell his property. In such case the owner cannot recover of the vendee. But this is upon the ground, that it would be allowing the party to commit a fraud upon an innocent purchaser. 3 Steph. N. P. 2677.—*Gregg* v. *Wells*, 10 Adol. & Ellis 90.

J. Barrett for defendant.

1. Unless plaintiff's right of possession be violated, *trover* does not lie. Defendant had the right of possession under the contract up to the time of the alledged sale and redelivery of the sheep to plaintiff. When plaintiff became repossessed of the sheep, the defendant was not thereafter holding them in violation of plaintiff's right.

When was the alledged conversion? A refusal to deliver on demand is not *evidence* of conversion, unless it be shown to be in defendant's power to deliver the property. *Rice* v. *Clark*, 8 Vt. 109. Text-books *passim.*

Take Justice BULLER's account of *trover*, as being "a special "action on the case, which one may have against another, who "hath in his possession any of his goods by delivery, finding or

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"otherwise, or sells or makes use of them without his consent, or "refuses to deliver them on demand." Buller's N. P. 32.

Disposing of the sheep with such consent either to Downer or any one else was not conversion. *Knapp et al.* v. *Winchester*, 11 Vt. 351.

The most that can be said is, that the repurchase by plaintiff was settling between the parties, that the defendant was not to return the *specific sheep*, and was to be accountable under his contract only *for other like sheep*. That accountability is not the subject of *trover*.

2. The evidence given by Mr. Tracy was admissible. The law of the subject is stated in 1 Greenleaf Ev. § § 165, 166. *Glass* v. *Beach*, 5 Vt. 172. *State* v. *Hooker*, 17 Vt. 658. *Marsh* v. *Jones*, 21 Vt. 378.

By the Court. 1. It is objected, that the court erred in refusing to charge the jury, that selling the sheep or part of them to the plaintiff, he knowing them, at the time, to be the same sheep he had leased to defendant, was a conversion of the sheep so sold. But we think this portion of the charge was correct. A sale *ex vi termini* implies the consent of both parties, the *aggregatio mentium*, as much as any other contract. It could not, therefore, be fairly said, that this property, by the very act of sale to plaintiff, was converted *from* his use and *to* the use of defendant, which is necessary to maintain this action.

2. The testimony of Mr. Tracy is not fully detailed, but the excepting party is bound to state any defect in the case, upon which he relies, fully. The manner of Mr. Tracy's taking minutes, or his confidence in their accuracy, is not stated. As we are bound to make reasonable presumptions in favor of the proceedings below, we must suppose the minutes of Mr. Tracy were kept in the usual mode, that is, that they contained the *substance* of all the testimony of the witness, in the very words of the witness, and that the witness knew this to be the fact, either from recollection or from his usual mode of taking minutes. If that was the case, it will bring the minutes within the rule laid down in the cases in this State. *Marsh* v. *Jones*, 21 Vt. 378.

And the consideration, that the witness could not swear from memory, is not, at present, regarded as important. All that is

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required is, that the witness shall be able to state, that the memorandum is correct. He may then read it, as well as repeat it. The certainty of its contents being the truth is not affected by that, either way. Where a transaction is remote, out of mind, or consists of a multiplicity of facts, a detail of dates, sums, &c., or a long narrative, like the testimony of a witness, where certainty is desirable, nothing could be satisfactory but minutes made at the time. Hence the old rule, that the witness must be able to swear from memory, is now pretty much exploded.

Judgment affirmed.

SHERWIN AND SALPAUGH *v.* RUT. & BUR. RAIL ROAD CO.

Contract under Seal. Condition Precedent.

Where the plaintiff contracted under seal to perform certain labor upon defendant's road, *by a specified time*, which was subsequently enlarged *by parol*, it was *held*,—that plaintiff's cannot sue in covenant.

A contract under seal cannot be varied by a mere parol contract, whether in writing or not, since such a contract is inferior to the original contract.

But written contracts not under seal may be varied; then both contracts, being of the same grade, the whole being set forth, and performance alledged, within the enlarged time, assumpsit will lie. So too, when the covenants are independent of each other, one may maintain an action, without avering performance on his part.

In a contract under seal, if the defendant hinders the plaintiff from full performance of a condition precedent, or if he expressly waive it, under his hand and seal, he is estopped from insisting upon the failure of plaintiff in his defense.

ACTION for a breach of covenant, in three counts. To the first count the defendants pleaded, and issues were joined. To the second and third counts, the defendants demurred.

The county court, December TERM, 1851,—COLLAMER, J. presiding—rendered judgment that the second and third counts were insufficient.

Exceptions by plaintiffs.

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The *second count* presents this question:—If one, who has *covenanted* to perform certain work by a certain time, fail to perform by the *time stipulated*, can he sustain an action *upon the covenant*, by proving, that *the time for performance was enlarged by parol.*

The *third count* presents the question, whether if one, who has *covenanted* to perform labor, upon a railroad, *by a time specified*, fail to perform his covenant *by the time*, he may sustain an action upon the covenant, by proving that after the time had expired, he continued, with the knowledge of the Railroad Co., to perform such labor as the covenant required, and received directions from time to time in reference to its performance, and received partial payments, and that he did complete, ultimately, the whole labor, and that the work, was then accepted and used by the corporation. A discontinuance being entered as to the first count, the case passed to this court for revision.

Washburn & Marsh for plaintiffs.

We admit, that the general rule has been, previous to the case of *Myrick* v. *Slason et al.*, 19 Vt. 121, that if one covenant to do work by a time specified, and omit to perform it within the time, he cannot sustain an action upon the covenant: but if, after the time limited, he still proceed with the work, and the other party encourage him in so doing, or by parol enlarge the time of performance, and accept the work, when completed, the party performing the labor may recover upon a *quantum meruit*. *Porter et al.* v. *Stewart*, 2 Aik. 417. *Little et al.* v. *Holland*, 3 T. R. 590.—*Brown* v. *Goodman*, 3 T. R. 592. (*n*). *Cook* v. *Jennings*, 7 T. R. 381. *Heard* v. *Wadham*, 1 East. 619. *Phillips* v. *Rose*, 8 Johns. 393. *Freeman* v. *Adams*, 9 Johns. 115. *Burn* v. *Miller*, 4 Tount. 745. *Creig* v. *Talbot*, 2 B. & C. 179. (9 E. C. L. 56.) But we submit, that the case of *Myrick* v. *Slason et. al.*, has established a different rule; and that upon the authority of that case, if it appear, that the party has performed the work, both parties understanding that it was performed under the contract, a recovery can *only* be had in action of covenant, although the contract be not performed according to its terms. Whether the *time*, within which a covenant is to be performed, is any more a condition precedent to the right to demand payment, than the *manner* of performance, is a question, which perhaps arises in this case, as dis-

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tinguishing it from *Myrick* v. *Slason et al.*, and which we submit to the determination of the court.

Tracy, Converse & Barrett for defendants.

The law is too well settled, now to be questioned, that in the action of *covenant* when there is a condition precedent to be performed, such precedent condition must be performed and avered in order to entitle the plaintiff to recover. If parties enlarge the time or make any other alteration in the terms of the covenant, no recovery can be had on the covenant although the parol agreement be strictly complied with. *Porter et. al.* v. *Stewart*, 2 Aik. 417, and cases there cited.

By the Court. This case presents the naked question, whether the plaintiff having contracted *under seal* to perform certain labor upon the defendant's road, *by a specified time*, which was subsequently enlarged *by parol*, can sue in covenant. The case of *Porter* v. *Stewart*, 2 Aiken 417, expressly decides, that he cannot, and that case has never been questioned, in this State, although the case of *Little* v. *Holland*, upon which the case of *Porter* v. *Stewart* is professedly based, has been sometimes doubted elsewhere. But although resting upon the merest technicality, it seems to us sound. It goes upon the ground, that performance, on the part of the plaintiff by the time stipulated, is a *condition precedent* to any right of action on his part, as, in a case like the present, where performance on the part of the plaintiff is the entire consideration for the defendants covenant, it always is. And also that the contract, being under seal, cannot be varied, by a mere parol contract, whether in writing or not, since such a contract is inferior to the original contract. But if the defendant hinder the plaintiff from full performance of a condition precedent, or if he expressly waive it, under his hand and seal, he is estopped from insisting upon the failure of plaintiff in his defense; he is estopped in the one case by his own wrong, and in the other by his deed.

This rule does not apply to written contracts, not under seal.—Then both contracts, being of the same grade, the whole being set forth, and performance alledged, within the enlarged time, assumpsit will lie. So too where the covenants are independent of each

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other, one may maintain an action without avering performance on his part.

But in a case like the present, it is now considered, that if the party chooses to sue upon the contract *specially*, he must declare in assumpsit, treating the enlargement as having incorporated the original terms of the contract into itself, and so all resting in parol, *Vicary* v. *Moore*, 2 Watts R. 451. Chit. on Con. 113 and notes. How far the party in such a case would be entitled to sue in a general action, it is not necessary to consider. The case of *Myrick* v. *Slason et al.*, 19 Vt. R., is not applicable to this subject, for many reasons. No question of the effect of the subsequent alteration of the contract under seal is there made, as there was no evidence of any such thing. The plaintiff there claimed to recover in *book account* for an *attempt* to perform his contract, without any waiver or alteration of the contract, and where all he had done had been done and received under the contract. It is there said the plaintiff's remedy was under the contract, in covenant and not on book. But as the question was not before us, we did not intend to decide whether, upon the facts there found, the plaintiff could recover in any form. We presume, however, that after the decision then made, no one ever supposed he could.

Judgment affirmed.

Redfield, J. My own views, upon the subject of the alteration of contracts under seal, are fully expressed in *Lawrence* v. *Dole*, 11 Vt. R., 549, upon more examination of the subject, than is now in my power. It is there said, "Where this alteration is "in regard to a condition precedent, and is necessary to be shown "by the party afterwards seeking redress upon the contract, it is "required, that the alteration should be by a contract of as high a "nature as the original contract; else the party performing the al- "tered contract will lose his remedy, i. e., upon the original con- "tract, or in covenant." The rule is there held to be different, where the alteration is relied upon by way of *defense*.

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JOHN WARNER v. DAVID CONANT.

[IN CHANCERY.]

Chancery will not relieve against a judgment rendered against one as trustee, on the ground that such trustee, through forgetfulness, failed to attend the court rendering such judgment, and make his disclosure, even though it appear that such trustee would have been discharged upon making such disclosure; when no fraud is imputable to the party obtaining such judgment.

Query. Had there been fraud in the transaction, would equity relieve, while the party could have relief by *Audita Querela*, unless brought as a bill of discovery.

APPEAL FROM CHANCERY. The orator set forth in his bill, that the defendant sued out his writ of attachment against Henry Rice as principal defendant, and summoned the orator as the trustee of said Rice, which was made returnable before a justice of the peace, on the second Tuesday in April, A. D. 1848, and was duly served upon the said Rice and the orator; that on the return day of said writ, the orator, through forgetfulness, neglected to attend and make his disclosure, and that judgment was rendered against him by default, as trustee of said Rice, for $72,63 damages and costs.

That about three hours after said judgment was rendered the orator's agent, on being told that said judgment had been rendered, applied to the defendant's attorney, and requested him to have said default struck off, and offered to pay all costs and trouble, if he would do so, but he declined. Also, alledging that the defendant had taken out an execution on said judgment, and collected the amount thereof of the orator, and that he was not the trustee of said Rice.

The prayer of the bill was, that the defendant should be decreed to refund the amount collected on said execution, and for general relief.

To this bill the defendant made answer, and the orator filed a replication, and testimony was taken and the cause was heard by COLLAMER, chancellor, who dismissed the orator's bill, and an appeal was taken therefrom.

H. E. Stoughton for the orator.

It has been decided, *Denison* v. *True*, 22 Vt. 42, that a trus-

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tee has no remedy by petition under the "fraud, accident and mistake act;" the orator cannot, therefore, have relief in that way.

It has been repeatedly decided, that a trustee is not a party to the suit. *Huntington* v. *Tr. of Spooner*, 3 Vt. 515. And 5 Vt. 186. *Baxter* v. *Vincent*, 6 Vt. 614. *Earl* v. *Leland*, 14 Vt. 328.

It is well settled that the adjudication of a court, as to the funds in a trustees hands, is not a judgment. Comp. Stat. 259, § 27 to 35 inclusive. The determination is not a judgment, but a mere inquest. *Aldis* v. *Hull*, 1 Dan.Chip. 309. *Emerson et al.* v. *Paine*, 9 Vt. 271.

It turns out that the orator had no funds in his hands, and that the defendant has satisfied his judgment against his debtor, out of the orator's property, and a decree that he refund it would leave the judgment in full force against Rice.

Suppose the adjudication of the justice is to be treated as a judgment, still the orator is entitled to relief. *Cram* v. *Hawks*, 1 Root 468. *Woolcot* v. *Day*, 2 Root 62. *Draffoucid* v. *Donald*, 2 H. & M. 10. *Countess of S.* v. *Gifford*, 2 P. Williams 424. *Emerson* v. *Udall*, 13 Vt. 477.

L. Adams for defendant.

The authorities are numerous and decisive against the present application. *Essex Co.* v. *Berry*, 2 Vt. 161. *Fletcher* v. *Warren*, 18 Vt. 45. *Barnet* v. *Pas. Turnpike Co.* 15 Vt. 757. *Dennison* v. *True*, 22 Vt. 42. *Ins. Co.* v. *Hodgden*, 2 U. S. Con. R. Kinne's Law Com. April, 1849, 107.

The opinion of the court was delivered by

Isham, J. The general object of this bill is to obtain a decree for the re-payment of money collected by the defendant of the orator, on an execution issued on judgment against him, as trustee of one Rice.

From the evidence which has been read in the case, we think it more than probable, that if there had been a hearing on a disclosure, the person summoned as trustee would have been entitled to a discharge, as not having effects in his hands; yet the conviction would be more full and perfect, if a disclosure had been made. The last settlement between Warner and Rice was made Februa-

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ry 14, 1848, but it was then understood not to be a settlement of all matters between them. Rice having soon after left the country, Warner carried on to his books a full statement of the account and credit, leaving a small balance due to Rice. How much that might have been increased, if at all, had Rice remained and settled the account, is of course a matter of conjecture.

The orator seeks relief on the ground that the judgment against him as trustee, was obtained by "*fraud, accident or mistake.*"

In the case of *Denison* v. *True*, 22 Vt. Rep. 42, it was held by this court, that a trustee could not maintain a petition under the statute, to the county court, to have a judgment against him vacated on the ground that it was obtained by "fraud, accident or mistake," as he could not be considered a party to the suit; and for this reason, the orator now seeks relief under the general powers of a court of chancery. From the testimony in the case, it is very evident that the defendant is entirely free from any imputation of fraud or impropriety of conduct, in obtaining the judgment complained of. He commenced his suit in due form, and in the observance of all legal requirements on his part, prosecuted the same to judgment, execution and satisfaction.

The orator has, however, been deprived of a hearing in the case, which doubtless he intended and desired to have. But it is equally evident, that this difficulty has arisen from his own neglect, or the pure forgetfulness of his agent, to whom this business was intrusted.

We do not feel at liberty to interfere in this case, with the proceedings at law, upon the suggestion that the orator had not personal notice of the suit before judgment. He has not himself denied it under oath by swearing to his bill, and his agent Nicholson, says he might have mentioned the fact to him, but thinks not. The process, however, was returned, with a legal return thereon, that personal service was made. This justified the defendant in proceeding to his judgment, and as between the parties, we must regard that fact as found in equity as well as at law. The case then presents the single inquiry, will a court of chancery vacate a judgment at law, or order the money collected thereon to be refunded, on the ground that the party or his agent neglected to attend the court, and suffered judgment to pass by default, through their forgetfulness of the suit, or the day and time of holding the

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court, and whether such a circumstance is an *accident or mistake* from which a court of equity will relieve. The cases on this subject, which have been decided in this State, must be considered as conclusive in this.

In *Essex* v. *Berry*, 2 Vt. Rep. 161, where a judgment was obtained by default, in consequence of a letter sent by mail to their attorney not having been received in season, it was held, that that circumstance was not such an *accident* as would warrant a court of equity to interfere, as common prudence would have guarded against that event, by sending an agent. Equally so in this case. If the orator or his clerk had seasonably employed an agent or attorney, as he testifies he designed to do, there would have been the exercise of better and greater prudence; and in that case, the court adopt the language of Lord Redesdale in *Bateman* v. *Willoe*, 1 Sch. & Lef.—"That a bill for a new trial is watched with extreme jealousy;" and also the language of GROSE, J., in *Marriot* v. *Hampton*, 7 Tenn. Rep. 269. "That it would tend to encourage the greatest negligence, if the door were to be opened "to parties, to try their causes again, because they were not prop-"erly prepared at first;" so in the case of *Fletcher* v. *Warren*, 18 Vt. Rep. 45, the court say, that a judgment at law may have worked injustice between the parties, is not of itself enough to authorise a court of equity to relieve against it. It is necessary that a party not only should have had a good defense, but it must appear that he has been *unable to avail himself of it through the fraud or wrongful act of his opponent;* mere accident or mistake, on his own part, is to be accounted as his misfortune, not as imputing a wrong to the other party. Justice STORY, Eq. Juris. 119 Sec. 105, under the head of accident, speaking of the powers of a court of chancery, says "That a party coming into a court of "equity is bound to show that his title to relief is unmixed with "any gross misconduct or negligence of himself, or his agents." The orator seeks to avoid the force of these decisions, in courts of equity, by distinguishing between a judgment in a common law suit, and a judgment rendered in a trustee process against the trustee, not regarding the latter as a regular judgment. It is true that the principal debtor has rights under our statutes, which cannot be enjoyed by the trustee. But the judgment against the trustee is as much a matter of record, and the adjudication is as

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conclusive against him, as any judgment rendered at law, and the final process of execution issues on the judgment, as in other cases. We entertain no doubt, that the principles which forbid a court of chancery to relieve in one case, must equally forbid such relief in the other.

The result is, that the decree of the chancellor is affirmed.

JOSEPH BOWMAN *v.* THE TOWN OF BARNARD.

Constables. Selectmen to require Bonds. Towns liable for neglect, before bonds are required. Evidence.

A Constable derives his official powers, from his election and the statute defining his powers, and he is not required to give bonds, until the selectmen of the town specify the amount, name the securities and request the due execution of the bonds, and he can execute the duties of the office, until these steps are taken, and the request is made; hence, he is authorized to make an attachment, and the town is responsible for his neglect to deliver property, thus attached, on the execution when demanded.

Property attached on *mesne* process, is by statute held to respond the judgment, and the officer is entitled to the custody and possession of the same; therefore, in a suit, against the town, for the neglect of the constable, so to hold the property, it is not competent, for the town in mitigation of damages, to show "that the creditor may, still, by a new process or new execution, obtain satisfaction of his debt," for the creditor has a right to proceed against the specific property attached until his judgment and execution is satisfied.

TRESPASS ON THE CASE, for the official default of Lucius Freeman, constable of the town of Barnard, in not keeping certain pearlash, attached by him upon a writ in favor of the plaintiff, against Joseph B. Danforth and Moses Montague.

Plea, the general issue and trial by jury.

On trial, the plaintiff gave in evidence the original writ in his favor, against Danforth and Montague, and the officers return thereon. The writ bore date, March twenty-second, 1848, and it appeared from the return, which was signed by Lucius Freeman, as constable, that it was served March twenty-second, A. D. 1848, by attaching thirteen barrels of pearlash, as the property of the defendants therein.

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It was conceded, that judgment was rendered in favor of the plaintiff, in that suit, as alledged in the declaration.

The plaintiff also gave in evidence the execution, in that suit, dated June 18, 1849, with an indorsement thereon, that it was received by Hiram Aikens, constable, July 11, 1849, and an indorsement of *nulla bona* August 16, 1849. The plaintiff also proved, that Lucius Freeman was elected constable of Barnard, at a legal town meeting, duly warned, and held March 7, 1848.

Hiram Aikens, the constable to whom the execution was delivered, testified, that, on the 12th day of July, 1849, he demanded of Freeman, the pearlash attached on the original writ; Aikens then holding the execution above described—and that it was not delivered to him. And it was further proved that said pearlash was of much greater value than the amount of said execution.

The defendants then offered to prove, that Lucius Freeman, who was elected constable, March 7th, 1848, did not give a bond, as constable, until after he had made service of the writ in favor of the plaintiff, as above stated, and that the plaintiff upon delivering that writ to Freeman, knowing that he had not given a bond as constable, took from Freeman a writing, that he would faithfully perform his duty as constable, in relation to this attachment, and answer for all neglect. To this testimony the plaintiff objected, and it was excluded by the court. To which decision the defendants excepted.

The defendants then gave evidence tending to prove, that during all the time, from July 11th, 1849, to February or March, 1850, Joseph B. Danforth, the execution debtor above named, was possessed in his own right of attachable personal property, such as horses, cattle, &c., to an amount exceeding four hundred dollars, and more than sufficient to have secured and paid the judgment in favor of this plaintiff; that all this was well known to the plaintiff and his agent; and that after the constable Aikens had demanded the pearlash of Freeman, July 12th, 1849, as above stated, Aikens called upon the plaintiff and his agent for instructions, in reference to doing any thing further with the execution, and that they gave him no instructions to attach property, and thereupon the return of *nulla bona* was made as above stated, and no further steps were taken by the plaintiff towards securing the said jndgment. The defendants requested the court to charge the jury,

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that they were entitled to consider this testimony, in mitigation of damages;—that the plaintiff could not recover in this suit the full amount of his judgment against Danforth and Montague, if by ordinary diligence on his part, he might have collected the whole amount of his judgment from Danforth, as the testimony tended to prove; that if they found that Danforth, on the 11th day of July, 1849, and from thence all the time until Feb., 1850, was possessed of personal property in his own right, to an amount which the testimony on the part of the defendants tended to prove—and more than sufficient to pay and satisfy the judgment above described, and this was well known to the plaintiff, but he wholly neglected to cause his execution to be levied thereon, or in any manner to collect the same from said property, he could recover no more than nominal damages in this suit.

But the court directed the jury to return a verdict for the plaintiff, for the full amount of his judgment against Danforth and Montague, above described.

To which the defendants excepted.

Washburn & Marsh for defendants.

1. Until Freeman gave the bond required by statute, he was not constable *de facto*, even so as to render the town responsible for his defaults in reference to business intrusted to him by one certainly knowing the facts. Comp. St. 116 § 27.

In this respect, the authority of a constable differs from that of a deputy sheriff. The deputy sheriff is vested with power to act by his deputation; and it is optional with the sheriff, whether to require a bond or not. Comp. St. 97 § § 5, 6.

It is not, then, a case within the judgment in the case of *Ferris* v. *Smith*, Chittenden Co., Dec. term, 1851, where the right to act vests from the moment of election; but it is precisely analogous to the class of cases recognized in that case,—where the right rests upon compliance with the statute requisites.

2. The testimony offered by the defendants further tended to prove, that the plaintiff acted with full knowledge of the facts, and that, when he delivered the writ to Freeman for service, he required, and received from Freeman *a written obligation that he would faithfully perform his duty as constable, in relation to the attachment, and would answer for all neglect.* This was a direct

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recognition of the absence of liability on the part of the town, and an acceptance of a personal liability, merely on the part of Freeman.

Even if the liability of the town existed, it was competent for plaintiff to *waive* that liability, and rely upon the personal obligation of Freeman. This being a question of *intent*, is to be determined from a consideration of the acts of the parties; and the testimony excluded was legitimate evidence upon this point. Whether this was the intent of the plaintiff, or whether he intended to receive a cumulative security merely, is not an inference of law, but of fact; and any testimony is admissible, which has any tendency to prove the fact.

3. The jury should have considered, in mitigation of damages, the facts proved in reference to the neglect of the plaintiff to levy his execution upon the property of the debtors—although he might have done so. He could at any time, within seven months, have secured the amount of his judgment against them.

The action is *case*, brought to recover *damages* for the officer's misconduct,—leaving to the plaintiff still the right to recover his debt against the original debtor; and the defendants have at common law, the right to give in evidence all facts, tending to show what damage the plaintiff really sustained. *Bounafous* v. *Walker*, 2 T. R. 126. *Treas. of Vt.* v. *Weeks*, 4 Vt. 223. *Kidder* v. *Barker*, 18 Vt. 454. *Ives* v. *Strong*, 19 Vt. 546.

The case, in this respect, should be governed by the same rule of law, as applied in determining in an action upon a recognizance for an appeal, whether or not the plaintiff has sustained intervening damages. In that case, the value of the plaintiff's chance of obtaining payment of his debt by pursuing any other remedy, is to be considered in mitigation of damages. *Holmes* v. *Woodruff*, 20 Vt. 97.

The whole case stands thus:—the plaintiff delivered his execution to Freeman at a time when he *knew* that Freeman had not executed the bond required by statute—he received from Freeman his *personal* obligation, to perform faithfully his duties—and he omitted wholly to collect his debt from the debtors, when he might have done so. Neither considerations of equity, or law, entitle him to recover.

Tracy, Converse & Barrett for plaintiff.

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1. Towns are liable in the first instance for the defaults of their constable. *Mc Gregor* v. *Walden*, 14 Vt. 450. *Bramble* v. *Poultney*, 11 Vt. 208.

Towns are liable for all such *defaults* and *neglects* as would make the constable liable. Rev. Stat. 89, § 27.

Freeman was constable, *de facto*, before giving bonds, and whatever he did as an officer *de facto*, is good and binding on the public, and on every one who may be party to any proceeding, or interested in any official act of his.

The bond was for the security and indemnity of the town, and for them alone. No one but the town could maintain a suit on the bond. *Middlebury* v. *Nixon*, 1 Vt. 232. The town might therefore dispense with it altogether, and no one could interfere or complain.

The giving of a bond was not necessary to constitute him constable, unless the town chose to vacate the office by appointing another for that reason. *Nason* v. *Dillingham*, 15 Mass. 170.— *Bush et al.* v. *Collins*, 7 Johns. R. 549. *Buckman v. Ruggles*, 15 Mass. 181. *Marbury* v. *Madison*, 1 Cranch R. 138. *Craig* v. *Norfork*, 1 Mod. 122. *Hale* v. *Cushing*, 2 Greenl. R. 218. *Jones* v. *Gibson*, 1 N. H. 266. *Mc Gregor* v. *Batch*, 14 Vt. 428.

If the constable however, was only one *de facto*, and not one *de jure*, until he gave a bond, the town should be held liable for his official delinquencies. It was their *fault* that he was so. Freeman himself could not escape liability on that ground, neither can the town. *Johnston* v. *Wilson*. 2 N. H. 202.

Freeman, after serving the writ, did give bonds, and it is to be inferred they were such as the law requires, and that the bond covered the whole year, and all defaults and neglects, whether happening before or after giving the bond. *Colgate et al.* v. *Hill*, 20 Vt. 56. *Fletcher* v. *Austin et al.*, 11 Vt. 447.

2. The fact, that the plaintiff took a writing from the constable, that he would faithfully perform his duty as constable, could not alter the case. It was just what the law imposed without the writing, and in no sense altered the liability of the constable or the town. If it did impose an additional liability on the constable, how could that affect the ordinary liability of the town?

3. That Danforth had property, can make no difference. The property, attached on the writ, was that with which the judgment

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was to be satisfied. It is to be presumed the constable had the property in his hands, and if he had not, he is liable to account for it. And the statute provides that the property attached, shall be held to respond to the judgment. Rev. Stat. 182, § 19; also p. 179 § 2; p. 181 § 16. *Bacon* v. *Lincoln*, 2 Cush. 124.

The plaintiff has a right to pursue the property attached, and it is his duty to do so. He is under no obligation to pursue other property. *Ladd* v. *Blunt*, 4 Mass. 402. 1 Swift's Dig. 798.

Where property attached is receipted, and is suffered to go back into the hands of the debtor, the liability of the receiptor, depends upon the liability of the officer. *Lowry* v. *Stevens et al.*, 6 Vt. 113. *Allen* v. *Butler et al.*, 9 Vt. 122. *Lowry* v. *Cady et al.*, 4 Vt. 504. *Spencer* v. *Williams*, 2 Vt. 209. *Allen* v. *Carty*, 19 Vt. 65. "The attachment makes the officer liable at all events "for the value of the property attached, providing the plaintiff is "diligent in obtaining a judgment and execution, and delivering "the latter to the officer. *Phillips* v. *Bridge*, 11 Mass. 242.

If an officer attach property, and fails to satisfy execution that is seasonably put into his hands, his liability is the amount of the execution and interest. *Sanburn* v. *Emerson* 12 N. H. 57. *Maxfield* v. *Scott*, 17 Vt. 634. *Fairfield* v. *Baldwin*, 12 Pick. R. 388.

The fact, that the debtor is *solvent*, is not admissible in mitigation of damages, in a suit against sheriff for the property attached. *Tyler* v. *Ulmer*, 12 Mass. 163. Nor can a deduction be made for expense, that might have been incurred in keeping the property. *Higgins* v. *Kendrick*, 14 Maine R. 83.

The opinion of the court was delivered by

ISHAM, J. The object of this suit, is to recover damages which the plaintiff claims to have sustained by the neglect of one Lucius Freeman, elected as constable of that town on the 7th of March, 1848.

We learn from the case, that a writ was issued by the plaintiff against J. B. Danforth and others, on which a quantity of pearl-ash was attached by Freeman, as constable. It is not disputed in the case, but that a judgment was duly rendered in the suit upon which the attachment was made. That the property attached, was duly charged on the execution, and that Freeman by whom the attachment was made, neglected to deliver the property to respond the judgment recovered.

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Neither is it disputed but that Freeman was duly elected constable of the town, and that in every respect he has conformed to the requirements of law, except that no bond had been given by him, as constable, to the town until after the service of this writ. And it is claimed on the part of the defense, that no legal attachment of this property was made, and that the town cannot be held responsible therefor, nor for any act of his as constable, until after the bond was executed. This objection proceeds upon the ground, that until the execution of the bond, he is not clothed with any official authority or power. And that the execution and delivery of the bond is a pre-requisite as necessary and essential to give validity to his acts, as his election by the freemen of the town.

The statute makes it the duty of the towns, annually to elect their constables; and when elected, within their territorial jurisdiction, there is given them the same powers that are vested in sheriffs in their respective counties. The 27th and 28th Sects. of the Comp. Stat., p. 116, contain the specific provisions upon which the questions in this case are presented, and provide that the several constables, before they enter upon the duties of their office, shall give bonds to the town, in such sums and with such sureties as *the selectmen may require.* And if he shall refuse to give such bond, his office shall be considered vacant. It will at once be perceived that ample power is given to the towns to protect themselves in their liability, by requiring at once the execution of the bond, and rendering him incapable of entering upon the duties of the office, in case of his refusal. In such an event they are authorized to consider the office as vacant, and proceed to another appointment—or, if the request for the execution of the bond is delayed, it may be made at any time during the year, with the same consequences.

But it is not in their power to vacate the office or treat it as vacated, or suspend the constable in the discharge of his official duties, until he is placed in fault, by a refusal to execute the bonds.

It is evident from the various provisions of the statute, that the bond when given, stands as a security, or indemnity for the town, and for their specific use and benefit only. And like other matters given as personal benefits and rights, may be insisted upon, or waived, at the option of those to whom the right or benefit is given. So long as the selectmen neglect to require the execution

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of the bond, for that period, it must be considered as a waiver of their right, and dispenses with the necessity of its execution by the constable until requested, and the constable not having refused to give bonds, and his office not having been vacated by any act of the selectmen, he properly can exercise the duties of that office, until rendered vacant by a request and refusal to execute them.

The provisions of the statute are quite specific and definite.—The constable derives his official authority from his election, and the statute defining his powers. And he is not required to give bonds, until certain preliminary steps are first taken by the selectmen of the town; they are to specify the amount for which the bond is to be given, name the securities required, and request its due execution. Until these steps are taken, it is impossible for the constable to execute the bond, and as it cannot be given in consequence of the neglect or waiver of the matter by the selectmen, the officer can well execute the duties of the office, until those steps are taken and the request is made, and he stands in the same light, he would stand, if the bond was not required by the statute, for he is not, until those preliminary steps have been taken, under its operation. To give the act a different construction, would put it in the power of the selectmen to deprive him of the benefits of the office, and virtually vacate the appointment, though he has never refused to give the bonds, but on the contrary has ever been ready and willing to execute them.

We think, therefore, in this case, that the officer was authorized to make the attachment, and that the town is responsible for his neglect to deliver the property on the execution when demanded.

The evidence offered in mitigation of damages we think, also, was properly rejected. The Stat., p. 253 § 83, provides that personal property attached on *mesne* process, shall be held to respond the judgment, and for that purpose, the officer is entitled to the custody and possession of the same. And against that specific property, the creditor has a right to proceed until his judgment and execution is satisfied. The case of *Tyler* v. *Ulmer*, 12 Mass. R. 163, is decisive on this question.

In that case, the court say that "it would be extremely mischievous to permit an officer to excuse himself, or even to alleviate "the damages, consequent upon a wilful neglect of duty, by showing that the creditor may still, by a new process, or new execu-

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"tion, obtain satisfaction of his debt." The result is, that the judgment of the county court must be affirmed.

CHARLES P. MARSH *v.* NATHAN AND JOSHUA DAVIS.

Assumpsit. Evidence. Disclosure of trustee. Judgment.

If A. cause a note payable to him, to be transferred and made payable to B., for the purpose of keeping the same out of the reach of the trustee process, it would be fraudulent, as to the creditor A.; and the maker of the note could properly be adjudged trustee of A., so long, at least, as it remained in the hands of A. or B. or of any other person cognizant of, and privy to, such fraudulent intent.

The declarations and conversations of A. and the maker of the note, in relation to the transfer, if a continuing negotiation, and said between the parties during the arrangement, are admissible, as part of the *res gestae*.

But if such transfer was for the benefit of B., as a particular creditor of A., and a preference merely, among his creditors, it is not fraudulent.

Testimony to rebut the inference of fraud arising from the negotiation and transfer of the note, is admissible.

If a trustee makes but a partial disclosure, without giving a full statement of all the facts, as well those that would operate to his discharge, as those which would charge him as trustee, the judgment will furnish him no protection; the trustee, from his relation to the payee of the note, as well as for his own security, should notify the payee of the note of the pendency of the proceedings.

And if the payee and his assignee are neither made a party to the trustee proceeding, and both remain ignorant during the whole proceeding of that suit, they will not be bound by the judgment.

ASSUMPSIT upon a promissory note. Plea, the general issue, and trial by jury.

On trial, the plaintiff gave in evidence the note declared upon and rested.

The defendants then called Rufus Davis, who testified that the defendant Nathan Davis, in July, 1850, met one Daniel Aikens in the road, about three and a half miles from the residence of the defendant, and spoke to him about a note, which he, Daniel Aikens, then held against said defendant, and asked defendant if he

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could pay it; that defendant replied that he could not pay it then, but would make it out shortly; that Aikens then said he wanted defendant to write a new note, running to his brother, Hiram Aikens, and said *he was afraid defendant would be trusteed on the note, or the note which said Daniel then held;* that defendant told him he would write a new note for thirty dollars, and that defendant asked Daniel if he wanted to have the note signed by Joshua Davis; that Daniel replied, he might do as he pleased, that his name was on the old note; that said Daniel further said, that he should be over in a few days and bring the old note and take the new note; witness further testified, that defendant Nathan Davis thereupon went home and wrote the note now in suit, and the defendants signed it, Daniel Aikens not then being present. To the admission of all which evidence, plaintiff objected. The objection was overruled, to which plaintiff excepted.

The defendant then called Hiram Aikens, who testified that he did not receive the note from the defendants, and did not know at the time, that it was given; that the defendant Nathan Davis called upon the witness, a few days after the execution of the note, and said to him, that he, defendant, settled with Daniel Aikens a few days before, and had given him a note, running to the witness, and wanted to know *when he should want his pay upon it;* that he, witness, replied *that he should want the pay soon, to pay out where he was holden for Daniel Aikens;* and that the defendant replied, *he would pay it soon, or before a great while.* Witness testified that he was then holden as *surety* for Daniel Aikens to a *large amount*, and that Daniel Aikens *was then indebted* to witness to a large amount for advances.

Witness further testified, that there was then outstanding in the hands of Zerah Lull, a deputy sheriff, an execution in favor of the Woodstock Bank, against Daniel Aikens, Hiram Aikens and Stephen Bosworth, which *was* the debt of Daniel Aikens, said Hiram and Stephen being sureties, which execution was dated June 20th, 1850, and issued from Windsor county court; that Bosworth and Daniel Aikens were *insolvent*, and the sheriff *required payment of the execution to be made by the witness;* that the witness desired said Lull to obtain all he could from Daniel, and thereupon said Lull called upon Daniel early in August, 1850, and Daniel placed in his hands various papers, as collateral security for the

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payment of the execution, and among them the note in suit; that said note was never seen by witness until after it was turned out to said Lull. That in August, 1850, and before the execution expired, Lull required payment of the execution to be made, and then the debtors in said execution, met said Lull, at plaintiff's office, and there was the first time witness ever read said note, or had possession thereof, and that then, by consent of said Daniel, he turned out said note to plaintiff, as security to him for advancing part of the money to pay said execution, and that witness was holden to plaintiff for the amount of said note, if the same was not collected of the defendants, for the advances so made by plaintiff.

The said Lull testified, that he delivered over said note to plaintiff, by consent of said Daniel and Hiram. It did not appear that plaintiff ever had knowledge that Daniel Aikens had ever any interest in this note. The plaintiff offered to prove that before the execution of the note in suit, it had been agreed between Daniel and Hiram, that said Daniel should procure notes to be executed to Hiram, as the note in suit was, as security for the liabilities and advances, by said Hiram for Daniel, as before stated. Defendants objected to the admission of this testimony, and it was excluded by the court. To which plaintiff excepted.

The defendants then offered in evidence, the certified copy of the record of a judgment, in favor of one Stillman F. Smith against Daniel Aikens and the defendant Nathan Davis, as trustee, also a receipt from said Smith to Nathan Davis. To the admission of said record, the plaintiff objected, on the ground that said judgment and satisfaction thereof, was no defense to this suit. The objection was overruled by the court. To which plaintiff excepted. Upon these facts the court directed the jury to return a verdict for defendants. Exceptions by plaintiff.

Washburn & Marsh for plaintiff.

1. The conversation sworn to, did not occur at *the time* of the act done, which it is supposed to refer to.

2. It did not occur at *the place* where the act was done, but in the highway, three or four miles from it. *Enos* v. *Tuttle*, 3 Conn. 247. *Elkins* v. *Hamilton*, 20 Vt. 627.

3. So far as this plaintiff is concerned, this trustee process ought not to affect him. It was "*res inter alias acta*" and that principle

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should apply in its full force; as the court, per HALL, J., say in *Seward* v. *Heflin*, 20 Vt. 144, "It is contrary to the plainest "principles of justice, that he should be bound by a judgment to "which he was not a party, and to which he had no opportunity "to object."

Indeed, we think the law as laid down in that case, is decisive of the case at bar;—the trustee's disclosures were deficient in an important particular in omitting to state what Hiram had stated to him, about *his wishing the note paid to him soon, in order to pay out where he was holden*, and the assurance also, that he, Davis, had given Hiram, that he would *pay the note to him.*

The case of *Camp* v. *Scott and Tr.*, 14 Vt. 387, can furnish no authority for a case like the present, so different from that case in all its important facts.

I. S. Belcher for defendants.

The note was the property of Daniel Aikens when given, and remained his property, until it was transferred to the plaintiff.

It was liable to be attached by trustee process, notwithstanding it was made payable to Hiram Aikens, until it was transferred, and notice of the transfer given to the makers. *Camp* v. *Scott and Tr.*, 14 Vt. 387.

The conversation between Daniel Aikens and defendant Nathan Davis was *original*, not *hearsay* evidence. The fact in controversy was, whether such conversation was had, not whether it was true. Greenleaf Ev. § 100. *Lyman* v. *Lull et al.*, 20 Vt. 349. *White* v. *Morton*, 22 Vt. 15.

The record of a judgment against Daniel Aikens and defendant Nathan Davis' trustee, was admissible. It shows an attachment and payment of the note in suit.

The opinion of the court was delivered by

ISHAM, J. The note upon which the plaintiff has declared was executed by the defendants, on the 16th of July, 1850, and made payable to Hiram Aikens, or bearer, and which soon after, was transferred to the plaintiff by the payee of the note. Its consideration, was the balance due on a previous note, given by the defendants to Daniel Aikens, which was given up on the execution of this.

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The defense rests upon the validity and payment of a judgment on this note, in a trustee process in favor of Stillman F. Smith against Daniel Aikens, the payee of the original note, as principal debtor, and this defendant Nathan Davis, as trustee,—and it is claimed that the payment of that judgment by the defendant, makes a good defense in this action. To give that effect to the judgment and payment, it must appear that this note, at the time of the service of the trustee process, was in reality the property of Daniel Aikens, and subject to be attached by his creditors, and that the proceedings in the trustee process were of that character which will conclude the rights of the plaintiff to this note. For the purpose of proving that Daniel Aikens was in reality the owner of this note, testimony was introduced by the defendants, to show that the exchange of notes, from Daniel to Hiram Aikens, was made with a fraudulent design, and there can be no doubt, that if the original note to Daniel Aikens was given up for the one now in suit, payable to Hiram Aikens, for the purpose of keeping its avails from the creditors of Daniel Aikens, and placing the same out of the reach of a trustee process, it would be subject to be attached as his property, and the makers of the note could properly be adjudged as the trustees of Daniel Aikens. And the note would continue subject to that attachment, so long, at least, as it remained in the hands of either of those parties, or of any other person cognizant of, and privy to, such fraudulent intent,—for such a disposition of a *chose* in action would be as void against creditors, as any fraudulent disposition of personal property at common law. This doctrine was decided in the case of *Camp* v. *Scott and Trustee*, 14 Vt. 387.

The questions which are now presented, arise on the admission and rejection of testimony offered in evidence, during the trial of the case. To prove that exchange fraudulent, the defendants introduced evidence, showing the declaration of Daniel Aikens, that he was fearful the original note would be trusteed, if it remained in that situation, to prevent which he requested not only its renewal, but that the new note should be made payable to Hiram Aikens, and that in pursuance of that request, the note was so exchanged, a few days after. For that purpose, we entertain no doubt that the declarations and conversation between these parties, as detailed in the exceptions, were admissible, for it was a

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continuing negotiation, and what was said and done by the parties during that arrangement, and for the purpose of effecting that object, was admissible as part of the *res gestae;* it was cotemporaneous with the main fact, and tended to illustrate its character and object. 11 Pick. Rep. 362. 9 Bing. Rep. 349. 1 Green. Evid. § 110, 11.

If that testimony was admissible on the part of the defense, it was equally competent for the plaintiff to rebut any inference of fraud arising from that circumstance, and from the further circumstances, that Daniel Aikens retained the possession of the note for a season, and that Hiram Aikens was not only ignorant of that exchange, but was also ignorant that the new note was made payable to himself, until he was informed of it, a few days after, by Nathan Davis. As explanatory, therefore, of these circumstances, it was proper for the plaintiff to prove that Hiram Aikens was liable on debts for Daniel Aikens, that he had made advances for him, and that he was indebted for such advances. And that in consideration thereof, an agreement was made between them, that Daniel Aikens should procure notes or claims due to him, payable to Hiram Aikens, as security for such liability and advance, and if this note was exchanged and subsequently delivered under that arrangement and for that purpose, before the claims of any other creditor arose thereon, the jury should have been permitted to have heard the evidence as rebutting such inference of fraud, and showing the reason for desiring that exchange of notes, that it might not be trusteed. For instead of manifesting a disposition to place the note beyond the reach of his creditors, its tendency was to show that no such intent existed, and there were used proper efforts to appropriate it for that purpose, and for the benefit of this particular creditor. If there were other creditors, it may be considered a preference among them, but it was one he had a right to make and which the law will allow. 5 Tenn. Rep. 235. Chitty on Cont. 413.

In looking at the facts in this case, we find that an execution was in the hands of the sheriff, against Daniel and Hiram Aikens and one Bosworth, at the time of the exchange of the note which was for Daniel Aikens to pay, and that Bosworth and Daniel Aikens were insolvent. This may have been the reason why he wished the exchange and to prevent its being trusteed, that it

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might be available for Hiram Aikens in payment of that execution. We also learn, that within a few days after its execution, and nearly three months before the service of the trustee process, the note was handed to Hiram Aikens, the payee, who at that time, in the presence of Daniel Aikens and the officer, indorsed it to the plaintiff on receiving its amount, and which amount was then applied on the execution.

Upon these facts, it is difficult to see what circumstances of fraud exist in the case, even as between Daniel and Hiram Aikens, much less as affecting the plaintiff. It is obvious, that this testimony should have been received, and the jury instructed, that if such liabilities existed from Daniel to Hiram Aikens, and if this note was exchanged in pursuance of an arrangement to place in his hands available means for his security and indemnity, it was such a disposition of the note that would be unaffected by any fraudulent considerations.

The note was transferred to the plaintiff by Hiram Aikens early in August, 1850; from that period Daniel Aikens had no interest or property in the note. It being a negotiable instrument, the legal interest passed from him to Hiram Aikens on its delivery, and to the plaintiff by the indorsement of Hiram Aikens.

When, therefore, the trustee process was served on the 14th of November, 1850, Daniel Aikens had no interest in that note that could be reached by that attachment. Its legal and equitable interest had vested in the plaintiff nearly three months before, by a legal transfer from the payee of the note.

Neither was it necessary to protect his title to this note, that notice should have been given by the plaintiff to the makers of the note of the assignment to him, in order to protect the same from being trusteed as the property of Daniel Aikens. It would have been necessary, if the original note payable to Daniel Aikens had been assigned to Hiram Aikens, and by him to the plaintiff, as they would then have stood and claimed the note as assignees of Daniel Aikens. But that note was canceled, and on the execution and delivery of this note to Hiram Aikens a new and original debt was created thereby, and in relation to which he did not stand as the assignee of Daniel Aikens. And when this note was transferred to the plaintiff, he stood as the assignee of Hiram Aikens only; notice, therefore, from the plaintiff to the makers of

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the note, of the assignment to him, was necessary only where Hiram Aikens was prosecuted as principal debtor, and the defendants summoned as his trustee, and was not necessary to protect it in his hands from being attached of Daniel Aikens, for the reason before assigned, that the plaintiff is not the assignee of Daniel Aikens.

The remaining question in the case has reference to the effect upon the rights of the plaintiff to this note, of the proceedings under the trustee process in favor of Smith against Daniel Aikens and this defendant as trustee, and the payment of the judgment rendered thereon by the trustee. The record of this judgment and the evidence of its payment was admitted by the court, and the jury directed to return a verdict for the defendants. The case of *Seward* v. *Heflin*, 20 Vt. Rep. 148, is applicable, and seems to be decisive upon the questions arising on this part of the case. As a judgment it can have no effect upon the rights of the plaintiff, for the satisfactory reason, that he was not a party to the proceedings. It was the duty of the trustee, arising out of his relation to the payee of the note, or his assignee, if he knew of one, as well as for his own security, to have notified them of the pendency of those proceedings. This he might have done by application to the court to issue his citation to the payee, or his assignee to appear and protect his claim. Comp. Stat. p. 263, § 53. If the justice had refused or neglected to issue such notice, then he should have given personal notice to him for that purpose, and probably that would so far have made him a party to those proceedings, that the judgment would have been conclusive. But as no such proceedings were had, and as nothing appears but that the payee of the note and this plaintiff were, during the whole proceeding, in entire ignorance of that suit, it would be great injustice to say that they should be bound by that judgment, to which they were not parties and had no opportunity to object.

Neither is there any propriety in permitting Nathan Davis to avail himself of that judgment and payment, in his discharge of the present suit, unless his disclosure was honestly made, with a full statement of all the facts, the tendency of which would operate to his discharge, as well as those which would charge him as trustee. In his disclosure he simply stated, "that the new note "was payable to Hiram Aikens or bearer, and that he saw Mr.

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"Aikens a few days after the note was given, and that he said he "knew nothing about any such note." Whereas, it appears that he had been informed by Hiram Aikens, that he was holden for Daniel Aikens, and that he should want payment of the note soon, to pay the claims upon which he was liable for him, and that Mr. Davis then promised to pay Hiram Aikens the note before a great while. These important considerations were suppressed by Mr. Davis in his disclosure as trustee, and which ought to have been disclosed by him before the court, in the exercise of common justice towards the payee of the note, or his assignee. And for this suppression of material facts in his disclosure there is no propriety in permitting him to avail himself of the judgment and payment in his discharge of this suit. The conviction is not easily overcome, that there was a desire and an attempt to deprive the holder of this note of its avails, by keeping him ignorant of those proceedings, until the creditor in that suit had secured to himself the amount by a judgment against the trustee. The case in the 20th of Vt. Rep. is very decisive that such a disclosure is ineffectual as a protection to the trustee.

The result is, that the judgment of the county court must be reversed.

EBER ANGELL, JR. *v.* JOSEPH KEITH.

Trespass lies against an officer attaching by copy in town clerk's office, &c. Evidence. Custom or usage.

Replevin will lie against an officer, who attaches property, by leaving a copy in the town clerk's office, brought by some person other than the debtor, and so also, will *trespass* and *trover*.

There is no such uniformity, in the custom or usage of giving executions to the same officer making the attachment, that it can be regarded as evidence to show that the officer made the attachment, nor can it be regarded as evidence to show a particular and substantial fact.

TRESPASS for taking and carrying away hay. Plea, not guilty, and trial by jury.

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On trial, the plaintiff gave evidence tending to show that the hay was raised on his farm in Barnard, in the county of Windsor, and then in his barn on said farm; that the same was attached as the property of Eber Angell, his father, who resided with plaintiff on said farm, that said hay was taken on a writ of attachment against said Eber, and a copy of the same and return thereon left in the town clerk's office in said Barnard as provided by statute; that this was in December, 1849. There was no direct testimony to show who was the officer that made this service. The testimony tended to show, that said writ of attachment was duly returned and judgment rendered thereon against said Eber Angell, and execution thereon, and that defendant, as an officer, posted said hay for sale on said execution, and sold the same by sample, at public vendue, at Barnard village, to Rollin Richmond and Hiram Aikens, who soon after took and carried away a part of said hay, between one and two tons, and the remainder of said hay the plaintiff bought of said Richmond and Aikens, and used on said farm.

The defendant gave evidence tending to prove, that none of said hay was actually removed by said Richmond and Aikens until after the service of the writ in this action; and claimed of the court to charge the jury, that the plaintiff could recover for no more hay than had been actually removed from the barn, before the service of the writ in this action.

The court declined so to charge the jury, but did charge, that if they found the defendant first served the writ of attachment, by attaching the hay and leaving a copy in the town clerk's office, and this was passed to judgment and said hay sold by defendant on the execution; this taking on attachment was such a taking, as entitled the plaintiff to recover. That to entitle the plaintiff to recover, the jury must be convinced that defendant was the officer who served the attachment. If from the testimony in the case, and from the usual practice of delivering the execution to the same officer who served the attachment, the jury were satisfied, that defendant was the officer who served the attachment, they might find for the plaintiff, for whatever hay the defendant sold to said Richmond and Aikens, whether the same had been by them taken away before the service of the writ in this suit or not. Exceptions by defendant.

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W. C. French for defendant.

In some cases it has been held, that trespass can be sustained where a person unlawfully exercises an authority over the goods in defiance and to the exclusion of the true owner; no case has ever carried the rule any further. 2 Greenleaf Ev. 621. *Hart* v. *Hyde*, 5 Vt. 328. *Wilder* v. *Baker*, 1 Met. 27. *Phillips* v. *Hall*, 8 Wend. 610. *Wintringham* v. *Lafoy*, 7 Cow. 735.

If the sale by the officer conveyed the title to the property, it might perhaps merit a different consideration, but our courts have decided that in such a case no title passes to the vendee. That the sale merely conveys the interest of the judgment debtor in the property. The attachment creates no lein, and the sale conveys no title to the property. *Griffith* v. *Fowler*, 18 Vt. 390. *Austin* v. *Tilden*, 14 Vt. 325.

There was no testimony, as to who was the officer that served the attachment, nor was there testimony to the practice of delivering the execution to the officer making the attachment. If the existence of such a practice was proper to be considered by the jury, it should have been proved. *Birney* v. *Martin et al.*, 3 Vt. 236.

If proof had been offered it would leave improper, &c. See 2 Greenleaf Ev. § 251.

O. P. Chandler for plaintiff.

The attachment by copy is in law equivalent to an actual taking. It transfers the custody and right of control to the officer. It enables him to maintain trespass against the owner if he be the debtor, and against all wrong doers.

The trespass having been commenced before the bringing of the action, it is to be considered entire; it operates *ab initio;* and the rule of damage is the value of the property. *Clark* v. *Harrington*, 4 Vt. 75. *Lowry* v. *Walker*, 4 Vt. 76. *Lowry* v. *Walker*, 5 Vt. 185. *Hart* v. *Hyde*, 5 Vt. 328.

By the Court. 1. It having been decided in *May* v. *Hastings*, in Orleans county, on the last circuit, that an officer who attaches property, by leaving a copy in the town clerk's office, is liable to a suit of *replevin*, brought by some person, other than the debtor, it would seem to follow, that *trespass* and *trover* will lie. For *replevin* will only lie where the property is unjustly detained,

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which the officer could not be said to do, unless he had *taken* the property. It has long been settled, that as to the debtor, this mode of attachment effectually divests *him* of all possession, so that he cannot sue even a stranger who intermeddles. And we think the officer is estopped from denying the taking, as to all others who show title to the property.

2. But it is said there was no *direct* evidence that the defendant made the attachment, and it is not stated what evidence upon this point, was given, or that any was given, unless it is to be inferred that some was given, from it being stated that no *direct* evidence was given, and from the fact, that the jury were directed to consider the custom or usage of giving executions to the same officer making the attachment, we must conclude the evidence was very slight, if indeed any other existed. But as the jury were told to consider this usage as evidence, tending to show the defendant made the attachment, and if so, they might have determined the case upon this evidence alone, it is important that we should be able to say this is competent evidence for that purpose.

It appears to us, that there is no such uniformity in this custom or usage, that it can be regarded as evidence, to show a particular and substantial fact. The custom of giving out executions within thirty days after judgment, is far more uniform, than the one alluded to, and we suppose that no one ever relied upon that kind of evidence, to charge property in execution. A witness, who gave out an execution, might rely upon his habit of giving them out in thirty days, and that if he had not in the particular instance, it would have made an impression upon his mind, to enable *him* to say he *did* give it out in thirty days, but the jury could not with propriety, be allowed to consider this usage as showing the main fact. It is common to attach property to satisfy the judgment, but that of itself would scarcely be sufficient to show an attachment in a particular case. The truth is, this evidence is defective in two particulars. First, it rests upon no settled and reliable uniformity upon which the jury could safely be allowed to act. Second, it presupposes the existence of other evidence, and in the power of the party, which not being produced, ordinarily raises a presumption against the party, that if produced, it would operate against him.

Judgment reversed and case remanded.

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Asa T. Barron v. Rufus Barron, Azuba Sessions, Chester Baxter and Isaac Parkhurst.

[In Chancery.]

Trust interest. Husband and Wife—her rights as against the Husband, his creditors and assignees.

The grantee, in a deed, which is absolute in its terms and contains no recital of a trust interest, is as much chargeable as trustee by the acknowledgement of the trust in an answer to a bill in chancery brought against him, as though the deed contained an express declaration of the trust.

Where one buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person, who so pays the consideration.

The property of a married woman, whether acquired by gift, devise, or inheritance, before or during coverture, is regarded, in equity, as the property of the wife, and not of the husband, for the purpose of securing to her a provision for her support; and if that right has not been expressly and formally waived or forfeited by misconduct, it will be protected in equity against the husband in any proceedings, which may be adopted at law, or otherwise, for the purpose of reducing it to his possession, and will be equally protected against his assignees, or creditors.

The amount embraced within this equity of the wife, rests in the discretion of the court.

Where money, to which a married woman was entitled by inheritance from the estate of her father, was in the hands of the administrator at the time of the marriage, and it was agreed between the husband and wife and a third person, that a farm should be purchased, and paid for from such fund, and the deed thereof taken by such third person, to hold in trust for the wife, and this agreement was made and carried into execution, for the purpose of preserving the property, as the separate estate of the wife, and the price of the farm was in part paid by the administrator personally, from money in his hands, and in part paid by money which was delivered to the husband by the administrator, and received by the husband, for the express purpose of being applied towards the purchase of the farm, under the previous arrangement above mentioned; *it was held*, that a court of equity would protect the whole, as the property of the wife, and that she was to be regarded as the sole *cestui que trust* under the deed.

The mere receiving, by the husband, of the property of the wife, will not be such a reducing of it to his possession, as will affect the wife's right of survivorship, or equity to a settlement, unless it be received by the husband solely in the exercise of his *marital* rights, and for the purpose of its appropriation to his own use.

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Barron v. Barron et al.

Courts of equity for many purposes, treat husband and wife as distinct persons; capable of contracting with each other, and of having separate estates, debts, and interests, and, as a general rule, whenever a contract would be good at law, when made with trustees for the wife, that contract will be sustained in equity, when made with each other, without the intervention of trustees.

A *post nuptial* agreement between husband and wife, without the intervention of trustees, by which the wife renounces all further claim upon the husband for his services, or support for herself and children, and agrees, that she will contract no debts on his account, and the husband all claim for her services, or support, will be sustained in equity, so far as it has reference to the property of the wife, not only against the husband and his heirs; but against all others claiming under him, who, at least, were not creditors at the time the agreement was made.

APPEAL from the court of chancery. The orator alledges in his bill, that Rufus Barron on the 20th of October, 1846, was possessed of a large sum of money, to wit, $1100, and that on that day, he with one Azuba Sessions contracted with one Jedediah Kilburn, for a farm for the sum of $1800; that of this sum, Rufus Barron agreed to pay, and did pay $1100.

That at the time of said purchase, it was fraudulently agreed upon between said Rufus and Azuba, that she should take the deed directly to herself, and that no mention should be made in said deed of any interest that said Rufus had in and to the same, by virtue of said payment of $1100, as aforesaid.

That in pursuance of said fraudulent agreement, said conveyance was made directly to said Azuba, and no mention was made whatever in said deed, of any interest that said Rufus had in and to the same. That said Rufus did pay $1100, and has an immediate interest in the land in the proportion of $1100 to $1800.

That on or about the 28th day of December, 1846, said Rufus became and was indebted to the orator in a large sum, to wit, $817, in two notes signed by the said Rufus.

That orator commenced a suit on the same, to the May term of the Windsor county court, 1847, that real estate was attached, that orator obtained judgment for $844,15 damages, and $8,98 costs, that execution issued June 14th, 1847, and that on the 25th day of October, 1847, levied on eleven eighteenths of said farm, that said farm was appraised at $1400, exclusive of $145, allowed as railroad damages.

That debtor's interest $855,55, exclusive of said $145, is suffi-

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cient to satisfy said execution except the sum of $26,51. That Chester Baxter and Isaac Parkhurst claim to have some interest in the premises, &c.

Prayer. That defendants pay said execution, and in default thereof, that the levy of said execution be established, and that defendants convey the premises levied upon &c.

The bill, as to the defendant, Rufus Barron, was taken as confessed.

The defendant, Azuba Sessions, in her answer, denies that said Rufus was possessed of $1100, on the 20th day of October, 1846, and denies the facts stated and the whole equity of the orator's bill, and says, that on the 20th day of October, 1841, she, on her own account, purchased for $1800, the said farm, and gave her notes, which have since been paid. That all that said Rufus had to do with purchasing said farm, was at her request, to look up a farm such as she wanted, ascertain the price, and communicate to her. That the deed was taken in her name, because she alone purchased; that said Rufus and her daughter Melinda, were married September 6th, 1841, with the previous agreement, and as a consideration that her property should be secured to her separate use, and not subject to said Rufus' control. That her property, $1100, left her by her father, who died April 11th, 1840, was at the time of her marriage with said Rufus, in the hands of A. C. Perkins as administrator, and by him with her consent, was paid on the farm notes. That the residue of the notes were paid by said defendant; that no part of the daughter's portion was ever in the hands of said Rufus, only by investment in the farm.

That at the time of the purchase of said farm, it was understood and agreed that in fulfilment of the agreement before marriage, the administrator should invest her portion in said farm, and defendant to pay the residue, and take deed to herself and hold in trust for Melinda, that she permitted said Rufus to occupy, use and control said farm, and receive and apply the avails, until September 16th, 1844, when for mismanagement and abandonment, she resumed the control.

Says she has been informed, and supposes it may be true, that the orator held the notes, but without consideration, and with the sole purpose and intent to enable an attachment, and to commence this proceeding with the corrupt understanding and intent, if ora-

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tor should hold any part of the farm or filch any money, he and said Rufus would share the same. Admits suit, judgment, levy of execution as set forth. Says, that in December 1846, said Rufus was utterly poor, that if any money was passed on the giving of the notes, it was handed back, that said judgment, execution, and notes were fictitious and fraudulent, got up to cheat and defraud this defendant.

Says that Rufus was asked to sign one of the notes given for the farm, for $650, but refused, and A. C. Perkins signed with her.

Admits that since attachment, she has conveyed to Baxter, and informed him of the attachment.

The defendants, Chester Baxter and Isaac Parkhurst, in their answers, admit that they are grantees and purchasers of the premises by conveyance from defendant, Azuba Sessions to said Baxter, and from said Baxter to said Parkhurst, and that at the time of the purchase and conveyance, they each had notice of the orator's attachment.

The answers were traversed and testimony taken; the testimony of Jedediah Kilburn taken and filed, tended to prove, that he was the owner of the farm, and that in the Fall of 1841, he contracted to sell to Rufus Barron said farm, for $1800. And that said Rufus said he could not stop to make the writings at that time, and it was agreed to give forfeiture notes of one hundred and fifty dollars, that witness signed one note for that sum, and the said Rufus another note for same sum, and that both notes were put into the hands of John S. Marcy, Esq., of Royalton, and that if either party should fail to fulfil his agreement, he was to forfeit his note so given.

That the deed was made to Azuba Sessions, that witness did not know how it came to be so made, but that said Rufus said, when he came to see about making the writing, that said deed would not be made to him. That said Rufus paid the three first notes, amounting to $950. That said Rufus lived upon the farm, and carried it on from sometime in November, 1841, until the Spring of 1846, and his wife and said Azuba lived there with him. That said Rufus was industrious and carried on said farm as well as other people manage their farms, that said Rufus provided well for his family, and conducted well towards them, as far as witness

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knew. That Mrs. Azuba Sessions, Rufus Barron and A. C. Perkins were present at the office of John S. Marcy, when said writings were made, and that said Marcy made the writings.

That said Azuba signed all the notes for the farm, the first note for $650; A. C. Perkins signed with her, and the rest of the notes were secured by mortgage on the farm. That witness required more security than the mortgage, and said Azuba procured said Perkins to sign with her. That said Perkins came with said Azuba, that he looked over papers, and if he acted for any one, suppose he acted for her, he did look over the farm before the writings were made. That Mrs. Sessions at one time sent money by witness to pay note that had passed into the hands of one Barrett, but not enough to pay note, and witness carried receipt back to her.

The testimony of Mrs. Phidella Kilburn, wife of said Jedediah, was taken by orator, and filed and tended to prove, that said Azuba, in the fall and winter of 1841 and 1842, said upon witness asking her why she took the deed instead of said Rufus, that it was because if said Rufus should be taken away, his children would hold the property, he having two children by a former wife.— That said Rufus was married to his second wife, Melinda Sessions, daughter of said Azuba, about the first of September, 1841.

The testimony of Lydia Burgess was taken and filed, and tended to prove, that she lived in 1843, in the house with said Rufus and wife and said Azuba, and that in the month of August, 1843, the said Azuba, upon the occasion of said Rufus carrying away some hay, said that said Rufus managed the place, just as though he owned the whole of it, that he owned but a small share, between two and three hundred dollars; that Melinda's portion, or a part of her portion, was put into the farm, and she, the said Azuba, made up the rest; that said Rufus was an industrious man and provided well for his family.

The testimony of Theophilus Burgess was taken and filed, and tended to prove, that said Rufus managed the farm as well as most men manage their farms; that he lived about six months in the house with said Rufus and wife and said Azuba, thinks that he paid part of the rent to said Azuba.

The testimony of Oliver Curtis was taken and filed, and tended to prove, that the said Azuba sent for him to assist her in making a settlement with the said Rufus, about four years ago, and that

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at that time, said Azuba claimed some $700 in the farm, and that the use of that, with what she did, ought to support her; that she at that time, said that they owned the rest, said Rufus and wife being present; that said Rufus had made some improvements on the farm, that he put down an aqueduct, and made 30 or 40 rods of fence with cedar posts on the side of the road. That some two years ago, the said Rufus offered to purchase said Azuba's interest in said farm, and at that time had some $750 in money. That the said Rufus carried on the farm under an agreement, that he should have the use of the property and support the family.

Edward P. Nevans' testimony taken and filed, tended to prove, that he was a merchant in Royalton; that said Rufus and family traded at his store, and said Rufus settled and paid accounts;—cannot say as the said Azuba ever got goods and had them charged to said Rufus.

The testimony of Enos R. Jennings was taken and filed, and tended to prove, that he served the writ in suit, Asa T. Barron against said Rufus, and that on that occasion, said Azuba told witness that she wanted to sell her farm, and gave as a reason, that she wanted to let said Rufus have what he put in for the farm, for his two children, and that she wanted said Rufus' children by his last wife to have the rest; thinks that she said the interest of the said Rufus in the farm was about $300, and that her interest was $700.

The testimony of Theophilus Cushing was taken and filed, and tended to prove, that said Rufus was a man of industrious habits, and in 1840, reputed to be worth some $400 or $500.

The testimony of Dustin Bates taken and filed, tended to prove, that said Rufus, in 1841, and 1842, was reputed to be worth some $500 or $600; that the witness borrowed $200 of said Rufus, in 1840, that he paid it in part in the fall of 1841, and the remainder in the Spring of 1842; that said Rufus called for it, saying that he wanted it to pay for a farm he had been purchasing.

Daniel Taft's testimony taken and filed, tended to prove, that said Rufus, in 1841, and 1842, was reputed to be worth from $300 to $600.

The defendants took and filed the testimony of Lyman Benson, which tended to prove, that he was, about four years ago, at the house of said Rufus, to assist the said Azuba in making a settle-

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ment with said Rufus, that said Oliver Curtis was also present, and that upon no other occasion were they together for that purpose, that said Rufus at that time did not claim or represent that he had paid anything towards the farm, of his own property, and did not represent that he had any interest in the farm, only by his wife, that said Azuba, at that time, said her interest in the farm was $700 or $800, and that the farm was all paid for with her money and her daughter's. That a settlement was made and put into writing, and signed by said Rufus Barron and Melinda S. Barron, wife of the said Rufus, and daughter of the said Azuba. The said writing was as follows, to wit:—

"This agreement, made between Rufus Barron of Royalton, in "the county of Windsor and State of Vermont, on the one part, "and Melinda Barron, of said Royalton on the other part, she be- "ing his wife. Witnesseth:—That the said Rufus Barron, in con- "sequence of serious difficulties existing between him and the said "Melinda, agrees to leave her, and claim no more services or sup- "port from her whatever, and by her request give up to her the "care and support of her son, that she now has, and that of anoth- "er child, if she should have one, provided they are suitably taken "care of and not abused. But if it should appear that they are "neglected and abused, he the said Rufus Barron claims the right "to take the said children to his own care and support.

"And the said Melinda Barron agrees in consequence of serious "difficulties existing between her and the said Rufus Barron, her "husband, to leave him and claim no more services or support "from him for herself or children, and she will not at any time "contract any debts on his account whatever. In witness of this "our agreement, we hereunto interchangeably set our hands and "seals, this 14th day of March, A. D., 1844.

"Attest, Lyman Benson."

"Rufus Barron." (L. s.)
"Melinda Barron." (L. s.)

That at the time of making said writing, the said Rufus did not claim any thing as paid in towards the farm, of his own money, but claimed something for betterments, on account of bringing cedar posts, and making fence, and bringing water; that he claimed in all for betterments, or for farm being in better condition, something over $80. That it was at that time figured up and Mr. A.

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C. Perkins, who was present, became responsible for the amount, to him; that there was included in this amount, some hay and other articles. That Austin Robinson carried on the farm in 1844, under a written lease from the said Azuba, and in 1846, Horatio Spaulding carried on the farm under a written lease from said Azuba. The testimony of Alvah C. Perkins, taken and filed, tended to prove that said Azuba purchased a farm in Royalton, the 20th day of October, 1841, of Jedediah Kilburn, that Rufus Barron was present and looked over the farm with witness, and that said Rufus went to the village when the writings were made; that witness went to see that writings were made out agreeably to trade, by request of Mrs. Azuba Sessions; that price of said farm was $1800, and $1150 of that sum, secured by mortgage on the farm, and that witness signed note with the said Azuba, for $650, payable to said Kilburn, and due April 1st, 1842, and said Azuba signed the other notes. That witness asked the said Rufus to sign the said note for $650, with said Azuba, and said Rufus declined, saying that he had no interest there, and that witness had the property to pay for the farm, and ought to sign said note. That said Rufus and Melinda were married in September, 1841; that previous to her marriage, her name was Melinda Sessions, a daughter of Darius and Azuba Sessions. That it was the talk of both said Rufus and Melinda, previous to their marriage, that said Melinda's property should not go into the possession of said Rufus on their marriage, but should be kept for her use, and none of it go into his hands, and be under his control. That said Azuba took the deed of said farm with the consent and knowledge of said Rufus, the object being to secure it for the benefit and use of the said Melinda, and that it was a little short of $1100 that was paid towards said farm, of said Melinda's property. That at the time of the purchase of said farm, said Azuba and said Melinda's property was in the hands of witness, amounting to about $2000, in notes, and in addition to which there was about $200, in personal property. That at the time of the marriage of said Rufus and Melinda, the said Melinda's property was in the hands of witness, principally in notes; thinks the amount was between $1600 and $1700, but had not settled with the probate court. That witness was administrator of the estate of said Darius Sessions, who died in April, 1840, and thinks administration was closed in October,

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1842; and that witness paid over, of the money belonging to the estate of said Darius, the full amount for said farm, including principal and interest.

The court of chancery, at the August adjourned term, 1851, COLLAMER, chancellor, ordered and decreed that the orator's bill be dismissed, with costs.

From which order and decree the orator appealed.

Washburn & Marsh for orator.

The farm in question was purchased for $1800; and the plaintiff insists that his debtor, Rufus Barron, has an interest therein of at least $300, for money which belonged to him previous to his marriage, which a court of equity will enable the plaintiff to reach. *Waterman* v. *Cochran et al.*, 12 Vt. 699.

Mrs. Sessions admitted to *Mrs. Burgess*, that Rufus had between $200 and $300 in the farm. Rufus claimed, in presence of *Oliver Curtis*, that he had paid in between $300 and $400; and this was not denied by Mrs. Sessions. To *Jennings*, Mrs. Sessions said, she wanted to let Rufus have what he put in there, for his two first children, which she said was $300.

But the plaintiff also claims, that he is entitled to hold the farm for the *residue* of his debt.

To this the defendants reply, that the plaintiff cannot recover, by reason of the wife's "*equity*," as it is termed.

That the wife's "*equity*" is never enforced, (in the absence of cruel treatment, or similar cause,) except when the husband or his assignee is attempting to reduce to possession, that which is the *property of the wife*, and which cannot be obtained without resort to a court of chancery. If the husband have once reduced the property into possession, it is his absolutely, and equity will not *restrain* or *limit* his use of it. Story's Eq. 631, 633, 634, 635. *Jewson* v. *Maulson*, 2 Atk. 417. *Vanduzee* v. *Vanduzee*, 6 Paige 370, 371. 1 Mad. Ch. 387–8. 2 Kent 141. *Murray* v. *Ld. Elibank*, 10 Ves. 90. *Howard* v. *Moffatt*, 2 Johns. Ch. R. 206.

But in this case there is no attempt to reduce to the *husband's* possession, the property of the *wife*.

The parol agreement before marriage, is simply nugatory. It is *void*, both *at law* and in *equity*. Rev. St. 316. 1 Mad. Ch. 297–8. *Montacute* v. *Maxwell*, 1 P. Wms. 618. Newland on

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Cont. 191–3. *Reade* v. *Livingston*, 3 Johns. Ch. R. 481. *Dundas* v. *Dutens*, 1 Ves. 199.

And in asserting the wife's "*equity*," such anti-nuptial parol agreement does not vary the rights of the parties, for her equity is recognized and asserted, precisely to the same extent without, as with it; this case should therefore be considered precisely as though no such previous agreement existed. The *money*, which came into the hands of the husband from his wife's estate, became, by the operation of positive law, by the mere act of his receiving it, his absolute property. *Udall* v. *Kenney*, 3 Conn. 599. *Legg* v. *Legg*, 8 Mass. 101. 1 Madd. Ch. 381–2. *Ward* v. *Morrill*, 1 D. Ch. 322.

And the *trust* which was created in Mrs. Sessions, by her taking to herself the deed of land so paid for, was a trust in favor of the husband, and not of the wife.

The orator therefore, is not seeking, as assignee of the husband, to reduce to possession the *property of the wife*, but to obtain satisfaction for his debt from what is absolutely the property of the husband.

And the defendants can derive no aid from the *post nuptial agreement* of March 14th, 1844, for that recites no previous agreement, is made without the intervention of trustees, and is utterly *void*. 1 Story Eq. 653–4.

But if any effect is to be given to the anti-nuptial agreement as connected with the acts of the parties after marriage, it should merely be to effectuate the evident intent of the parties, by treating the property of the wife as *real estate*. The object of the parties was, as stated by the wife, to prevent the property being expended, and to prevent its being inherited by the husband's children by a former marriage, and for this, they chose to invest the money in *land*, on which they might all live together. The most, then, which the wife can claim, is that the property should be treated as though it had been *land*, at the time of the marriage.

If the property is so considered, then, by positive law, the usufruct of the real estate became, by operation of the marriage, absolutely the property of the husband; and the orator, whose levy is sufficient to embrace this, is seeking to obtain, to this extent, the property, not of the *wife* but of the *husband*. *Vanduzee* v. *Vanduzee*, 6 Paige 366, 370.

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This right of the husband is analogous to his interest in the wife's trust of a term, or her legal estate of a term. It is absolutely the property of the husband, and not subject to the wife's equity, and his assignment of it is valid. *Turner's Case*, 1 Vern. 7. *Tudor* v. *Samyne*, 2 Vern. 270. *Jewson* v. *Maulson*, 2 Atk. 421. Newland on Cont. 124. 1 Mad. Ch. 387.

But this is not a case where chancery will enforce the wife's equity against the husband, or his creditor. The wife *lives separate* from her husband *voluntarily*, without pretense of abuse or ill usage on his part, and when all the evidence shows him to be an industrious, prudent man, and that he has always provided well for his family. To grant a separate maintainance to the wife, would perpetuate this condition of things, contrary to the established policy of the court of chancery. 2 Story's Eq. 651. *Cooper* v. *Cleason*, 3 Johns. Ch. R. 521. *Rogers* v. *Rogers*. 4 Paige 516. *Bullock* v. *Menzies*, 4 Ves. 798. *Duncan* v. *Duncan*, 19 Ves 394.

But the wife's estate was between $1600 and $1700. There is no pretense that her husband has ever received to his own use, more than a very small portion of it. If the wife is entitled, under the circumstances, to any provision, she is not, by the established usage of this court, entitled to the *whole*. 1 Daniel's Ch. Pr. 140. *Burdon* v. *Dean*, 2 Ves. 608. *Wright* v. *Morley*, 11 Ves. 20, 21.

And the case should be referred to a master, to ascertain the amount of the entire fund, the amount received by the husband to his own personal use, and to report his opinion as to what should be allowed to the wife.

Tracy, Converse & Barrett for defendants.

The bill is brought on the ground of an alledged fraud in the investment of Rufus Barron's money in the farm, and taking the deed to the name of Mrs. Sessions.

The bill must be sustained on that ground, if sustained at all.

Objections to sustaining the bill on that ground.

1. If Rufus Barron was party to the alledged fraud, he could not get relieved as against Mrs. Sessions, either in equity or law. 1 Story's Eq. 364.

Unless the orator was affected by the fraud, he can stand only on the same ground as Rufus, and can claim no relief.

2. The orator is not affected by the alledged fraud, for three

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reasons. First. He was not a creditor *at the time of the purchase of the farm*, and could not have been in contemplation so as to be such in future. There is no legal implication of fraud only in case of existing present creditors. 1 Story's Eq. 347–8, 354, and note 2. 8 Wheat. U. S. Rep. 229. 5 Cond. Rep. 419. Second. No fraud was in fact intended or committed. The answer denies it, and the whole transaction as shown by the proof, repels any such idea. Third. Asa T. Barron *never was a creditor*. The claim of the answer is sustained by the legitimate result and force of the proof, viz., that Rufus was not indebted as alledged, but the proceeding was undertaken, to wrest from Mrs. Session's hands, her daughter's money invested in the farm. The answer alledges, and the proof leads to the result, that in 1846 Rufus was poor and had no credit, on which to base an indebtedness then accruing of $800.

3. But on the ground of the right of a judgment creditor to the aid of a court of chancery, to enable him to reach property of his debtor held in trust, the orator cannot prevail in this suit. First. We submit, there is no resulting trust in favor of Rufus Barron. None of *his* money was paid at the time of the purchase. A subsequent advance of money after the purchase is completed, cannot by relation, attach a trust to the original purchase. *Botsford* v. *Burn*, 2 J. C. 405, 409. *Pinney* v. *Fellows*, 15 Vt. 525.

This purchase was completed at the time the notes and mortgage were executed and delivered. The money claimed to have been paid by Rufus could only be treated as a subsequent advance giving no interest in the real estate by way of trust.

The evidence rebuts any presumption of a resulting trust; even if it were true, that Rufus Barron paid on the notes $200 or $300, of his own money. 2 Story's Eq. 445.

The entire understanding was, that the purchase was made and the title was taken to Mrs. Sessions, for the benefit alone, of Mrs. Sessions and Melinda.

Such was Rufus Barron's understanding and agreement, and any other claim or pretense now, is a fraud on Mrs. Sessions and Melinda.

Again, Rufus Barron is not asserting any trust. There is no declaration or creation of trust in his favor. It is left to arise by implication of law, from the *fact of payment of purchase money.*

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Until the person paying, sets up and claims a trust, the implication is, a gift of the money or a voluntary conveyance; which being without fraud is valid against both the donor and his subsequent creditors.

In order to establish a resulting trust, it must be shown by clear proof that the money of Rufus has gone into the purchase of the farm. This does not appear from the proof as it now stands. *Boyd* v. *McLane*, 1 Johns. C. R. 590. *Botsford* v. *Burr*, 2 Johns. R. 405.

But a full answer to the pretense of claim by way of resulting trust is, the bill is not framed in any such view and cannot be used for any such purpose.

On the main subject we submit two views, embracing and disposing of the whole case:

1. If all the money claimed in the bill was Melinda's, then the trust inures to her benefit in entire exclusion of her husband and his creditors. The case of *Pinney* v. *Fellows*, 15 Vt. 525, and *Porter* v. *Bank of Rutland et al.*, 19 Vt. 410, are conclusive, both that the whole money coming from her father's estate was hers as against her husband, and that she is the exclusive *cestui que trust.*

2. If the whole $1100 was in fact the legal property of Rufus before it was invested in the farm, by its investment it became a trust exclusively in favor of the wife, which neither he nor his subsequent creditors can reach.

It was invested under an anti-nuptial agreement, which was executed not only by the marriage, but by the actual investment of the money in trust.

The statute of frauds does not affect the case. This is not a case in which the *wife* is undertaking to enforce an executory anti-nuptial agreement resting in parol *by action brought by her* or *her* representatives. See *Pinney* v. *Fellows*, as to post-nuptial agreement.

The contract was executed. The action is brought by a subsequent fictitious creditor of the husband against the trustee.

The husband could not repudiate the settlement, and reclaim the money as a trust in his favor by a bill against either the trustee or the wife, or both together. *Ward* v. *Morrill et al.*, 1 D. Chip. R. 322. Nor can the creditor any more than the husband.

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The creditors can only do it when they have been defrauded by the voluntary conveyance or settlement, and generally subsequent creditors cannot be so defrauded. Newland on Cont. 384. 7 Pet. R. 393. 1 Story Eq. Ju. § 355, § 361, § 362. *Sexton* v. *Wheaton*, 5 Cond. Rep. 429.

The proof shows, that the farm was purchased pursuant to a contract embracing also a contract of marriage — securing property to her sole use. The object is to overhaul and diminish the provision thus made. 2 Story Eq. Ju. 631, close of § 1405.

The opinion of the court was delivered by

ISHAM, J. The object of this bill in chancery is to perfect the title of the orator to that portion of the premises therein described, which was conveyed by Jedediah Kilburn to Azuba Sessions, and upon which his execution against Rufus Barron was levied. The bill charges, that the premises were contracted for at the price of $1800, that the deed was executed to Mrs. Sessions for the purpose of keeping the property from the creditors of Rufus Barron, and that a fraudulent agreement to that effect was made between them. The orator further states, that Rufus Barron was possessed of $1100 in money, and paid that amount towards the purchase, and insists, that to that extent Rufus Barron has an equitable interest in the land, subject to be taken on his execution, and that a legal title to the premises upon which his execution was levied, should be perfected in him by decree of this court.

The bill is taken as confessed by Rufus Barron, but answered by the other defendants. Mrs. Sessions, in her answer, denies the facts stated, and the whole equity of the orator's bill. The defendants Baxter and Parkhurst, admit, that they are grantees and purchasers of the premises by regular conveyances from Mrs. Sessions to Baxter and from Baxter to Parkhurst, and that at the time of the conveyances they respectively had notice of the orator's attachment; so that their right and title is held subject to the claim of the orator under his attachment, as it may be perfected at law or in equity. The recovery of the judgment in favor of the orator *v.* Rufus Barron, the issuing an execution thereon, and the levy of the same on the premises in question, are facts not disputed; and it is equally undeniable, that the orator has laid a proper foundation for sustaining this bill, by exhausting his

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remedies at law in seeking satisfaction of his execution. The conveyance from Kilburn to Mrs. Sessions was made October 20, 1841, and was paid for at the time by the notes of Mrs. Sessions, with the understanding, however, that the notes were to be paid by the application of about $1,100 coming to Melinda, the wife of Rufus Barron, from the estate of her father, and which was then in the hands of the administrator; and the balance was to be paid by Mrs. Sessions from her own estate. It is evident, from the testimony in the case, that the deed was executed to Mrs. Sessions by the request of Melinda, and with the consent of Rufus Barron, for the purpose of placing the amount so paid from the distributive share of Melinda in the hands of her mother, as trustee, to preserve the same for her sole use and benefit and as her separate estate, so that in no event it should become the property of her husband, or subject to the inheritance of his children by a former wife. The case is free, therefore, from any question of fraud in fact, arising from the execution of the deed to Mrs. Sessions; for it does not appear, that Rufus Barron was any where indebted at that time, and the claim of the orator accrued several years after this transaction.

Mrs. Sessions admits, however, that her personal interest is only to the extent of about $700, and that she holds the remainder as trustee for her daughter Melinda; and insists that it belongs to Melinda as her separate property, independent of any claim of her husband or his creditors. This answer is conclusive upon her as to the extent of her personal interest in the premises; and though the deed may contain the statement, that its consideration was paid by Mrs. Sessions, and contains no recital of a trust interest, yet, she is as much chargeable as trustee, by the acknowledgment of the trust in her answer, as if the deed contained an express declaration of the trust. 2 Story's Eq. § 1201, and note 2. 2 Atk. 155.

The important inquiry, therefore, in the case is, who is really the *cestui que trust* under this deed, of that portion of the premises paid for by Melinda's share from the estate of her father? The question is presented free from any embarrassment arising from questions of fact; for we learn from the testimony, that the marriage of Rufus Barron with Melinda took place Sept. 6, 1841, while her father deceased April 11, 1840; so that the distributive

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share vested in the wife of Rufus Barron prior to their marriage, and her title thereto, though not reduced to her actual possession, became absolute and unconditional.

We are enabled to obtain an answer to the inquiry, which of these parties is entitled to that trust estate contained in the deed to Azuba Sessions, by ascertaining *to whom belonged the money which was paid for its purchase.* For it is a common principle in equity, "that where one buys land in the name of another and "pays the consideration money, the land will generally be held by "the grantee in trust for the person who so pays the consideration." This, says Justice STORY, "is an established doctrine, and not "open to controversy." 2 Story's Eq. § 1201, and note 2. Such conveyances create a resulting trust, which is not the subject of seizure or sale. But by the levy of an execution upon the premises there is created an equity in behalf of the creditor, which can be reached by the aid of a court of chancery; and this is one of the most important sources of equitable jurisdiction and power. *McDermot* v. *Strong*, 4 Johns. Ch. R. 687. *Scott* v. *Scholey*, 8 East. 467. *Waterman* v. *Cochran et al.*, 12 Vt. 699.

If in this case the money paid for the land was the property of the wife, constituted part of her separate property, and was subject to her sole disposition and use, then it is evident a court of equity should protect it for her benefit. But if by the marriage, or otherwise, that money became the absolute property of Rufus Barron, and as such was vested in real estate, then he has the equitable interest therein; he alone is the *cestui que trust*, and the property is held by the trustee for his benefit. In such case it is the duty of a court of equity to protect the title of this plaintiff under his levy, by decreeing the payment of his execution, or the conveyance of the legal interest in the premises upon which the execution was levied, as prayed for in the bill.

At common law, by the marriage the husband is seized of the freehold, *jure uxoris*, of all lands, of which she was seized of an estate of inheritance, at the time of their marriage. Co. Litt. 351, *a*. And he takes the rents and profits during their joint lives, and, in case of his survivorship, in some cases, during his natural life, as tenant by the courtesy. If she is seized of an estate for her own life, or *per auter vie*, the husband is seized thereof in right of his wife, and is entitled to the rents and profits. To

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all her chattels real, the husband becomes entitled, with the power to sell and otherwise dispose of the same, as he pleases during his life; and in case of his survivorship they become absolutely his. Of all her personal chattels capable of immediate and actual possession, he becomes likewise the absolute owner. To her *choses in action*, as debts due by bond, note, simple contract, or otherwise, he has a qualified right, rendered absolute by reducing them into possession during coverture; if not so reduced, they pass to the administrator of the wife. 2 Kent's Com. 113.

This right of the husband to the property of the wife is acquired in consideration of the obligation resting upon him by the marriage to pay her debts, as well as to maintain her and her children. But while this right is given to the husband over the property of the wife, no provision at common law is made to secure the performance of the corresponding duties of the husband to the wife,—as having this claim to her property, he is enabled to transfer and dispose of it, or, upon his bankruptcy and insolvency, the property would vest in his assignees for the benefit of his creditors, and his wife, whatever may have been her fortune, may, with her children, be left destitute of the means of subsistence. To remedy this deficiency in the common law, courts of equity, from the earliest period, have exercised their power by giving to the wife a right to a provision out of her own property, and which is termed, *the equity of the wife*. It was formerly considered, that this equity could be protected only where *the husband* was seeking the aid of a court of equity to obtain possession of the wife's property. 1 P. Wms. 460. 2 Story's Eq. § 1414. But since the case of *Lady Elibank* v. *Montoliere*, 5 Ves. 737, the wife is permitted to actively assert her claim in equity, as plaintiff. "The equity is the same, in whatever form or by whomso-"ever presented." 1 Lead. Cas. in Eq. 333.

It was also formerly considered, that this equity was confined to the absolute personal property of the wife. But afterwards it was extended to the rents and profits of real estate, in which she had a life interest. And at the present day this equity has a more extensive application, and is attached to the rents and profits of all her real estate, whether legal or equitable, whether they are of inheritance, or for life, and whether leasehold estates, or a trust term for years. Clancey 445–6. 5 Myl. & Craig 97, 101

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to 103, *Sturgis* v. *Champneys*, 4 Hare 1. *Hanson* v. *Keating*, 2 Story's Eq. § 1410. And whatever qualification may be found in the application of this doctrine to different cases, that qualification has no existence, where the husband and wife are living *separate and apart*, without any fault on the part of the wife, nor in case of the *bankruptcy* or *insolvency*, of the husband. 5 Vesey 517, *Lamb* v. *Milnes*. 10 Beav. 324, *Wilkinson* v. *Charlesworth*, and *Maisack* v. *Lyster*. In which Lord LANGDALE disapproved of the case *Vaughan* v. *Burk*, 13 Sim. 404.

In relation to her personal property, as well as her *choses in action*, this equity of the wife will equally be protected. It has been, and with some qualifications, is now held, that if her personal property had been actually reduced into possession, and is not a mere right or thing in action, so that a complete legal right is vested in the husband, the wife's equity can no longer be enforced. 1 Eq. Lead. Cas. 351. And that whenever he was pursuing the common *remedies at law* for the purpose of reducing into possession, the personal property of the wife, courts of equity will not interfere, but will ordinarily remain passive. 2 Story's Eq. § 1403. But it is now held, and the cases are not unfrequent, in which the husband has been restrained by injunction from enforcing his legal remedies to obtain the wife's property, or reducing to possession, the wife's choses in action, for the purpose of enforcing her equity to a settlement. 2 Kent 121 and note 6. Clancey on Mar. Wom. 466. 1 Eden 506, *Mason* v. *Masters*. 1 Roper on Hus. and Wife, 271. 2 Sim. 167, *Pierce* v. *Thornby*. 5 Johns. Ch. R. 477, *Kinney* v. *Udall*. 4 Paige, 74, *Van Epps* v. *Van Deusen*, and this is regarded as a salutary rule in case of the insolvency of the husband, or separation from his wife without fault on her part. In the case of *Eedes* v. *Eedes*, 11 Sim. 569, it was held, that where a married woman left her husband, and was living separate from him, but not in a state of adultery, she was entitled to a settlement out of a sum in stock, to which her husband had become entitled in her right. If the husband has obtained the possession of the property without suit, and it still remains in his hands, he will, in many cases, be adjudged the trustee of the wife; this was so decided in this State in the case of *Porter* v. *Bank of Rutland*, 19 Vt. 410. 2 Kent 146. Clancey 260. If the property of the wife have been received and appropriated by the husband to his use, other

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circumstances must determine, whether the wife has lost her equity. If they were living together, and the property have come into his possession, and so have been appropriated by her consent, it will be presumed a gift to her husband, and her equity will be lost. But if the property have been so appropriated under circumstances showing that it was to be repaid, then she will stand in equity, as the creditor of the husband, and her claim will be enforced against his executors. Thus where a wife advances money from her separate property, to redeem a mortgage on her husband's estate and takes a receipt for the money, she will stand in the place of the mortgagee, and the heir must redeem it from the wife. Reeve's Dom. Rel. 165. And Lord THURLOW ruled, that if a wife mortgaged her separate real estate for her husband's benefit, it will be considered the debt of the husband, and that it should be satisfied out of the assets of the husband's estate. 1 Ves. 186, *Clinton* v. *Hooper;* and Judge REEVES remarks, that wherever it appeared from the evidence, that the wife had claimed, that her husband was debtor, or that he had recognised himself as such by proposing to pay her, she is considered, on the death of the husband, as a creditor. Reeve's Dom. Rel. 165.

This equity of the wife, is also sustained in relation to the distributive share of an estate, to which she is entitled by inheritance, and whether that right became vested in her before or after marriage. The right of the husband to that species of property is purely marital, and which a creditor cannot exercise for the husband, against his will. In New Hampshire, in the case of *Parsons* v. *Parsons*, 9 N. H. 309, it was held, that a distributive share of an intestate estate, to which a *feme covert* is heir, does not vest absolutely in the husband, but he has simply the same qualified right that he has to her other *choses in action*. The same doctrine was sustained in *Wheeler* v. *Moore and Tr.*—PARKER, C. J., uses this emphatic language:—"That a husband has a right to "claim such distributive share to his own use, but that he is not "obliged to exercise that right. If he omit so to do, on his death, "the right will survive to the wife in her own right, and as heir "to the estate, and if he *neglect or refuse* to reduce it to possession, it is clear, that after his death, neither his heirs, or creditors, could assert any claim to it." And it was held in that case, that such property, until so reduced to possession, was not *at law*

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subject to an attachment at the suit of the creditors of the husband, or to the process of foreign attachment. 12 N. H. 164, *Marston* v. *Carter*.

In Mass., at law, the decisions are otherwise, and the interest of the husband in his wife's distributive share of an intestate estate is subject to be attached, in the hands of the administrator, by the trustee process, at the suit of a creditor of the husband. This right is there, as it is now in this State, given by express statute, and extends to legacies and other effects in the hands of the administrator. C. 109 § 62: 20 Pick. 563. *Wheeler* v. *Bowen*. Ibid. 517, *Hayword* v. *Hayword*. But in the last case it was held, that if the husband died without reducing the property into possession, it survived to the wife. And in the case of *Davis* v. *Newton*, 6 Met. 537, on a bill in equity, it was ruled, that whatever may be the rights of the creditors at law, yet at any time before distribution, the court will protect the equity of the wife, and compel them to make suitable provision for her support, and that of her children.

In New York, Chancellor KENT observes:—2 Kent 123, 114, that the leading provisions and principles of the English courts of equity, have been incorporated into the equity jurisprudence of that State, and that legacies and distributive shares accruing to the wife during coverture, stand on the same footing, the husband having simply a qualified interest therein, subject to the equity of the wife. 6 Johns. Ch. 178, *Haviland* v. *Bloom*. 5 Johns. Ch. 198, *Schuyler* v. *Haylee*.

In this State, a similar view has been entertained; and the case of *Short* v. *Sampson and Trustee*, 10 Vt. 446, contains the elements of the doctrine in relation to the equity of the wife, as it is held by the courts of chancery in England and most of the States in this country. In that case it was held, as in New Hampshire, "that the husband has no such interest in money decreed by the "probate court to be paid to the wife by the administrator, as her "distributive share in her ancestor's estate, as could be attached "by the creditors of the husband;" and the reason assigned is this—"that the right of the husband to this share, even after de-"cree of distribution, is only conditional; no specific money pass-"es by the decree. It is, at most, a mere *chose in action*, and as "such, belongs to the wife, until the husband reduce it to posses-

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"sion." And in relation to the equity of the wife, the court say, "that in chancery, such *choses in action* are treated as the sepa- "rate property of the wife, and on application will interfere to pre- "vent the husband from squandering such property, and compel "him to make suitable provision for the wife, or else appoint a re- "ceiver for her benefit; and that it would be unreasonable to per- "mit the creditors of the husband to reach such property." In this case, there is made a direct application of the doctrine of the wife's equity to her distributive share in the estate of her ancestors, as against the husband and his creditors. In all these cases, to which we have referred, the property of the wife, whether acquired by gift, devise, or inheritance, before or during coverture, is regarded as the property of the wife and not of the husband;— and if that right has not been expressly and formally waived, or forfeited by misconduct, it will be protected in equity against the husband in any proceedings, which may be adopted at law, or otherwise, for the purpose of reducing it to his possession. And will be equally protected against his assignees, or creditors; for it has been justly observed, that the "equity of the wife is para- "mount to the interests, powers, and rights of the husband, and "of all persons dealing with him." 1 Lead. Cas. in Eq., 352;— and by Lord LANGDALE it was held, that this protection would be equally extended to the income of the property, in case of the insolvency of the husband, or their separation. 10 Beau. 324, *Wilkinson* v. *Charlesworth.*

The amount embraced within this equity of the wife, rests in the discretion of the court; formerly it was limited to one half.— In the case of *Davis* v. *Newton*, 6 Met. 544, "it was held by Ch. "J. SHAW, that the amount depended upon circumstances—as the "amount of the property belonging to the wife, her age, health, "and condition, as well as the number, age and condition of her chil- "dren. In this respect, where the matter comes properly before "the court, it is competent for the chancellor to obtain the aid of "a master to inquire into their circumstances, and to report what "sum would be a suitable provision. But in cases where the pro- "perty is small, and has been kept entirely distinct from the hus- "band, and where it is evident, that the exigences of the family "require it, it would be proper to appropriate the whole of such "property to the use of the wife and her children;" and also the

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interest or income of the property, in case of their separation, or insolvency. 1 Lead. Cas. in Eq., 353. 5 Johns. Ch. R., 464, 478. 6 W. 25. 3 Kelly 193, 205.

The application of these principles, to this case, is not a matter of much difficulty. The money, to which the wife of Rufus Barron was entitled by inheritance from the estate of her father, was in the hands of the administrator at the time of the marriage and purchase of the farm. But little has been paid to her; some was paid to her husband, by her consent. The arrangement, for the purchase of the farm and manner of payment therefor, was a matter of mutual consent and agreement between the husband and wife and trustees, for the purpose of preserving the property as the separate estate of the wife; and the amount paid by the administrator to the holder of the notes given for the farm, was paid in pursuance of that mutual arrangement and agreement; and to that extent, we think it clear, that the money paid was the property of the wife. And it is equally evident, that the same consequences follow in relation to the money handed by the administrator to the husband for the purpose of paying the balance due on those notes from the wife. The facts in relation to the manner in which the money was handed to him by the administrator, are not disputed. When requested by the administrator, he refused to collect the notes belonging to his wife, for the purpose of paying the notes given for the farm, saying that no part of that estate should come into his hands,—but he consented, if the money was collected by the administrator, to carry the money to the holders of the notes, if it would be an accommodation to him.

If this, as has been contended by counsel, can be considered as a reduction of this property into possession by the husband, still as it was immediately applied upon the notes given for the land, in pursuance of their previous arrangement, no court of equity could refuse to protect it, as the property of the wife, the same as if the money had been sent by other hands. But the authorities are clear, that that was not such an act in reducing the property of the wife into the possession of the husband, as can effect the right or interest of the wife at law, or in equity. Other considerations must unite with the fact of actual possession, to affect her right of survivorship, or her equity to a settlement. To produce such results, Chancellor KENT remarks, 2 Kent, 118,—the possession of

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the husband must be in his character as husband, obtained in the exercise of his marital rights, and for the purpose of its appropriation to his own use. In the case of *Baker* v. *Hall*, 12 Ves. 497, the wife was residuary legatee; and the husband took possession of the real and personal estate of the testator, as executor; and it was held by the master of the rolls, that, as he took possession in that character, and not as husband, it could not be deemed sufficiently reduced into possession to prevent its survivorship to the wife. In *Wall* v. *Tomlinson*, 16 Ves. 413, a transfer of the wife's stock to the husband, as trustee, was held not to be a reduction into possession, so as to bar the wife's survivorship; for it was made *diverso intuitu*.

The case under consideration, is stronger than those, in behalf of the wife. As the money was handed to the husband by the executor and trustee of the wife, for the specific purpose of its appropriation in payment for the land, and in that character was received by the husband, under his disclaimer of any right thereto. It is difficult to conceive of a case, where the property of the wife has been kept more distinct from the husband, than in this, and for the purpose of securing her maintenance and the support of her children. In the same condition it remained, when paid towards the farm; for there had been no exercise of marital right in claiming it; and when the money was so paid, it was taken from the separate property of the wife, which it is the duty of a court of chancery to protect.

And on the execution of the deed to Mrs. Sessions, in pursuance of their mutual arrangement, the trust estate enured to the wife, from whom the consideration came, she is to be regarded as the sole *cestui que trust* under that deed, to the extent of the purchase money paid from her separate estate. Her interest is purely equitable, and can be obtained only by the aid of a court of equity; and chancery will not permit that property to be taken from its jurisdiction by the husband, or his creditors, until there has been secured the equity of the wife.

This view of that part of the case renders less important the examination of the case in relation to the post-nuptial agreement between Rufus Barron and his wife, yet as the question is directly presented in the case, it is proper to remark, that the agreement evidently would be of no avail at law. At common

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law the husband and wife are treated as one person; her legal existence is merged in that of her husband; their contracts, made when single, are avoided by the intermarriage; when made during coverture, they are of no binding obligation; the husband can neither grant to, or covenant with his wife, for that supposes her to possess a distinct and separate existence. From this principle arises the necessity, at law, of all conveyances, covenants, marriage settlements, and the like, being made through the interposition of trustees. Story's Eq. § 1380. 2 P. Wms. 79. 2 Ves. 190. But courts of equity, for more than a century, have disregarded that rule, and for many purposes treat husband and wife as distinct persons, capable of contracting with each other, and of having separate estates, debts and interests. Story's Eq. § 1368. 2 Johns. Ch. 539. And as a general rule, whenever a contract would be good at law, when made with trustees for the wife, that contract will be sustained in equity, when made with each other without the intervention of trustees. It is upon this principle, that in many cases the husband will be held as trustee of the wife, and the wife entitled to the privileges belonging to a creditor of the husband. Story's Eq. 1373, 1380.

The agreement in this case was made March 14, 1844, nearly three years after their marriage, and in substance, after agreeing to separate, the wife renounces all further claim upon the husband for his services, or support for herself and children, and agrees that she will contract no debts on his account; and the husband renounces all claim for her services, or support. This agreement, if carried into effect, should be enforced so as to fulfil the evident intention of the parties. Without looking at the instrument in any other light than with reference to its effect upon the property of the wife, it was manifestly his intention to renounce all his claim or marital right to her future services, as well as support from her property, leaving the same for her support and that of her children. That an agreement of that character, made directly between husband and wife, and without the intervention of trustees, will be sustained in equity, is clearly sustained by authority. Justice STORY remarks,—2 Story's Eq. § 1372,—"That if the husband should, for good reasons, after marriage, "contract with his wife that she should separately possess and en-"joy property bequeathed to her, the contract would be upheld

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"in equity." Chancellor Kent remarks,—2 Kent 147, 154,—"That a wife may contract with her husband, even by parol, after "marriage, for a transfer of property from him to her, or to trus-"tees for her, provided it be for a *bona fide* and valuable consid-"eration, and she may have that property limited to her separate "use." 1 P. Wms. 125. 2 Vern. 659. 2 Johns. Ch. 537. 10 Ves. 146. He further remarks, "that gifts by the husband to "the wife will be supported as her separate property, if they be "not prejudicial to creditors, even without the aid of trustees." In the case of *Herr's appeal*, 6 Law. Rep. 408, it was held in Penn. by Ch. J. GIBSON, that where the husband was in the habit of giving his wife the specie that came to him in the course of his business, until it amounted to $4500, it became the property of the wife, as against the heirs at law, and in the nature of a provision for her; and this gift and contract, made after marriage, and without the intervention of trustees, was enforced against his estate. In the case of *Searing* v. *Searing*, 9 Paige 284, the husband permitted the wife, after marriage, to receive the avails of her property, which she held before marriage, and re-loan the same on securities in her own name, and afterwards gave her $2000 which was loaned by her on like security, on her releasing her right of dower to his farm on its sale. It was held, that this gift and contract, though made after marriage and without the intervention of trustees, was binding upon the husband and his estate. And though such gifts would not be sustained against creditors, who were such at the time, yet they will be sustained against the husband and subsequent creditors. 3 Johns. Ch. 490, *Reed* v. *Livingston*. The same doctrine was sustained in this State in the case of *Pinney et al.* v. *Fellows*, 15 Vt. 536. In that case the court remarked, "that upon the receipt of property by the hus-"band from the wife, if, after marriage, he shall, for sufficient rea-"sons, contract with the wife, that she may possess and enjoy sep-"arately property bequeathed to her, or inherited by her, or such "as she may be the meritorious cause of acquiring, equity will "uphold such post-nuptial agreements, in cases in which the claims "of creditors will not be prejudiced by so doing;" and chancery would need no better reason for upholding such agreements, than the insolvency of the husband and his neglect to discharge his marital obligations. The orator in this case was not a creditor,

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at the time of this agreement, nor until a long time afterwards,—so long, that no inference can be drawn, or suspicion arise, that it was done in view of future indebtedness.

In such case it is equitable, that this agreement should be sustained, not only against the husband and his heirs, but against all others claiming under him, who at least were not creditors at the time, for he has parted with no property, that was his own. He has simply renounced all marital rights to the property of his wife, and which no creditor can compel him to exercise against his will, and which a court of equity would have required him to do, without such an agreement, not only in relation to the principal of her estate, but also to its income and profits, where a separation has taken place by act of the husband, or by their mutual consent.

So far, therefore, as the land, upon which the orator's execution was levied, was paid for by the property of the wife of Rufus Barron, we think this creditor can have no claim thereon for the payment of his debt.

It is further insisted, that about $300 was paid towards the farm by Rufus Barron from his own estate, independent of the money paid from the property of his wife. This is purely a question of fact; for no question has been made of the right of this creditor to the decree prayed for, if the money was so paid by him.

We are without the aid of an answer from Rufus Barron on this subject, who, it is to be presumed, could have told the amount and circumstances attending such payment, if made. The orator, however, has produced the testimony of Mrs. Burgess, Oliver Curtis and Mr. Jennings, from which it appears, that on different occasions Mrs. Sessions has stated, that Rufus Barron had an interest in the land of about $300, and that she was desirous of having it repaid for the benefit of his children by his former wife. Mrs. Sessions, in her answer, states the payment of the whole purchase money for the farm to have been made by her and the wife of Rufus Barron, and makes a distinct denial of any interests in him in the land. Mr. Perkins, the administrator, who assisted in purchasing the farm, and who was to see to the payment of the notes given therefor, states, that the whole sum, principal and interest, required for the payment of those notes, was raised from the

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property of Mrs. Sessions and the wife of Rufus Barron and furnished by him for that purpose. If the testimony rested here, there is not that preponderance of testimony, that would warrant a decree for the orator. But the circumstance, that exerts a controlling influence upon this question, arises from the settlement made in 1844, when the agreement for separation was made and signed by Rufus Barron and his wife. That settlement was made with much deliberation, and with the aid and assistance of mutual friends; and as their difficulties had brought to its final termination their cohabitation as husband and wife, it was evidently their object and design to bring to a similar termination all matters in which they had a community of interest. The terms of their mutual separation were agreed to, as well as the future possession and support of their children. The claim of Rufus Barron, arising out of the occupation and use of the farm was the subject of their negotiation and settlement, and the same motive, that induced him to present his claim for improvements he had placed on the farm, in making fences, constructing water-courses, and increasing its general productiveness, would have caused him to present his claim for money advanced in its purchase, if he had so advanced it. Mr. Perkins and Mr. Benson both testify, that he made no such claim, and that they understood the only claim he had was in right of his wife, except for the improvements and personal property; and when the amount of his claims were stated and receipted, and the mutual releases between Rufus Barron and his wife executed, we can but believe, that it was considered a full settlement of all claims, that he had upon them, or the premises.

It becomes unnecessary to refer to the objection made, that Mrs. Barron is not made a party to this bill, as no decree is made affecting her interests. But we cannot perceive, how a decree could have been made for the orator, affecting the interests of the wife, without her being made a party defendant. *Grant and Wife* v. *Van Schoonhoven*, 9 Paige 255. Story's Eq. Pl. 207.

The result is, that the decree of the chancellor must be affirmed.

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CALVIN FRENCH AND JOSIAH FRENCH *v.* HENRY M. WINSOR.

[IN CHANCERY.]

The probate court has, in certain cases, power to re-examine decrees, &c. Decrees of the probate court. Administrators.

The probate court have the power, so long as the case is pending either in that court, or in the common law courts, on the bond, to re-open and re-examine any of their former decrees in the premises, and correct all errors, irregularities and mistakes. *Adams v. Adams*, 21 Vt. R. 162.

A decree in the probate court, that an administrator ought to render his account is not a final decree. Such decree is regarded as affording a sufficient basis upon which to predicate a suit upon the bond given to secure the performance of the orders of the probate court.

An administrator cannot charge in his account, for the payment of a claim disallowed by the commissioners, after the right of appeal had lapsed, nor can he charge for the payment of a claim not presented to the commissioners, if the claimant had no farther right to petition the probate court to open the commission.

But if an administrator finds a claim not allowed by the commissioners, which was clearly due, and when no doubt could be entertained but that the probate court would extend the commission, to give an opportunity to present it, and where no question could be made as to its allowance; if under such circumstances, the administrator should pay the claim in good faith, and if under such circumstances, the claim cannot be allowed the administrator in his account, in the probate court, *quere*, whether a court of equity ought not to devise some remedy.

If there is no jurisdiction whatever in the probate court, it would not lay the foundation of any resort to a court of equity.

One who is administrator of an estate, against which he has claims, may bring in his claims against the estate, on his final accounting in the probate court, or present them to the commissioners, at his election.

Quere. How far the orator is entitled to redress, in this suit, for his services as attorney in fact, of the intestate, if such claim should be finally disallowed in the probate court.

APPEAL from the court of chancery. The orators alledged in the bill, in substance, that one Josiah French, deceased in January, 1825, purchased land in Clarendon, of James Winsor, for $3268,00 and secured the same by mortgage on the same land, payable with interest, and interest from the first day of April after date. That on the 23d day of January, 1825, said French paid

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three notes first due, amounting to $1000, and $190,92 indorsed on the fourth note, and James Winsor deposited the remaining notes in the Smithfield Bank, in Rhode Island, for safe keeping. That Reynolds S. Wilcox and John Wilcox had a mortgage of $1900 on the premises, executed by the said James Winsor, in January, 1822, and that in September, 1826, the ultimate balance of the Wilcox mortgage, of about $1000, was paid by the said French, and this, by agreement with Winsor, was applied in part payment of French's notes to him, and that this was done to save something to Winsor. That said Winsor appointed one William Brown, his attorney, to sell his property and close his debts, &c. That in March, 1825, said Brown, the lawful attorney of the said Winsor, settled with the said French, for certain services of said French and advances by him, made before that time, for the benefit of said Winsor, and gave said French said Winsor's note for a balance of $316,28, and that said Winsor was intemperate and wholly incapable of doing business, that the orator Calvin French, was afterwards appointed attorney of said James Winsor, and settled a claim in Rhode Island, and brought the notes off, deposited in said bank, that he subsequently settled with Josiah French for James Winsor's board and other things, to the amount of $680,70, from March, 1825, to January 1827, and that he, said Calvin French, did Winsor's business for him to value of $150, but under no charge. That the 8th day of August, 1827, James Winsor died, leaving Henry M. Winsor his only child and heir, and in January, 1828, the orator Calvin French took out letters of administration on James Winsor's estate, in the district of Rutland, and the other orator Josiah French, was surety on the bond, and that commissioners were appointed and allowed claims of $400 and more, and that the orator C. French, paid other claims not presented, by offsets on French's notes, and that he paid, of those allowed and not allowed, $1000 and more, leaving $530 in his hands, and that he paid this over to Josiah Gilson, the legal guardian of Henry M. Winsor, supposing this settlement would be binding upon the defendant, and that Josiah Gilson accounted to the ward for this sum, on settlement after the defendant came of full age, and the amount passed in the probate court. That said Josiah French, deceased, by the procurement of the defendant, made his will, giving defendant all his estate, and that now, the

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defendant has cited the orator C. French before the probate court for Rutland district,—obtained a decree in court, before the orator was aware of it, and refused to submit it to his own counsel,—and now insists upon collecting the amount of all the allowance he obtained in the probate court, sued the probate bond, and claims for C. French's neglect to render his account, damage, &c., and that suit is still pending. The defendant demurred. The court of chancery sustained the demurrer, from which decree the plaintiffs appealed.

C. French for orators.

As a general demurrer goes to the merits of the entire bill, I insist, that as the plea is such in this case, if any part of the bill is good, and entitles the complainants to relief on discovery, a demurrer to the whole bill cannot be sustained. *Boyce's Exr's.* v. *Grundy*, 3 Peters R. 210. 1 Peters Digest 339.

Upon the argument of a demurrer, it seems the court decides upon the facts stated in the bill, whether if the cause were to proceed to a hearing and they were proved or confessed, a decree would then be made. 2 Vesey Jr. 97. 7 id. 245. 3 id. 253. 2 Shoals & Lefray 638. 6 Vesey 686. Cited in Mitford's Pl. 157 and 160.

A demurrer to a bill, for cause that the complainant has a legal remedy will not be entertained, unless that remedy appears clear, and not doubtful or difficult. Mitford's Pl. 175 (note) and cases cited.

And even upon the principle that a court of law has concurrent jurisdiction, chancery will retain theirs, unless the right has been decided or failed of a determination, through the fault of the party asking relief. *Hall et al.* v. *Dana*, 2 Aiken R. 381.

When an individual has failed to present his account or claim to the commissioners appointed on an insolvent estate, by an understanding with the administrators to allow the same in offset or payment or claim in favor of the state, such claim may be allowed and offset in chancery. *Nimms et al.* v. *Rood et al.*, 11 Vt. R. 96.

The counsel also cited, *Adams* v. *Adams*, 22 Vt. 50. *Morse et al.* v. *Slason*, 13 Vt. R. 296. *id.* v. *id.*, 16 Vt. R. 319. 9 Vt. R. 41.

If the probate court, being a court of limited jurisdiction, assume

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one not granted by statute, their doings are not simply voidable, but absolutely void, *Kendrick* v. *Cleavland*, 2 Vt. R. 329; id. 339. *Darkin* v. *Hudson*, 6 Cowen 221. 9 Cowen 227. 19 Johns. 39. 17 Johns. 146. *Perkins* v. *Perkins*, 7 Conn. 558. *Smith* v. *Rice*, 11 Mass. R. 507. *Hunt* v. *Hapgood*, 4 Mass. 117. *Sumner* v. *Parker*, 7 Mass. 79.

Tracy, Converse & Barrett for defendant.

Is this a bill for discovery or for relief, or for both?

It is not for discovery. It is not pretended by the bill that orator wants testimony of defendant, for purpose of establishing any fact important to his rights. If a discovery, to aid in defense of what rights and before what tribunal. Is it a bill for relief?

Of what grievances does he complain?

Why, it would seem he complains that defendant wants orator should settle his administration account, and has taken measures to compel him. That probate court have said he must do so. That from his inattention and refusal to settle his account, the court has passed a decree that he account, and that he cannot appeal from it. That defendant has commenced a suit in name of probate court.

Orator complains of no fraud, accident, mistake or any other thing which ordinarily lay the foundation for chancery interference. Nothing done on part of defendant, to mislead or deceive him. No injustice is complained of, and none apprehended, arising from what defendant has done or omitted to do.

Nothing appears by the allegations in the bill, that he is charged or will be charged by probate court, with any thing more than he himself admits he ought to be charged with.

He cannot know, till his administration account is presented and passed upon.

Ought orator to settle his administration account?

Was he properly called upon for that purpose? Was he so ordered by probate court? Has he done so? Has he refused to do so? Had the probate court a right to commence a suit on his probate bond, to compel him to account? or to make him and his bail chargeable for the neglect?

All these questions must be answered in the affirmative.

Has orator been injured in any thing that has been done? In

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no way, unless the right to appeal from decree of probate court is an injury. If so, it was one incurred by his own obstinate refusal and voluntary neglect.

But it is no grievance of which he could complain. It is none in fact.

But let it be what it may, it is nothing which a court of chancery can interfere with or remedy.

Has the probate court of Rutland district jurisdiction? It seems that orator took administration from that court. It would seem strange that that court cannot call him to an account. But the question of jurisdiction is legitimately involved in the suit on the bond.

But courts of chancery cannot try questions of jurisdiction.

Had probate court, or the defendant, a right to institute a suit on probate bond? If they had not, the remedy is plain. Defend the suit. Orator does not need aid of chancery to make out his defense. He does not invoke the interference of chancery to furnish him with any means of defense, more than he already had.

If they had a right to commence and maintain the suit, it must be for some breach of the conditions of the bond, and why should chancery interfere to prevent the prosecuting said suit? Courts of law where it is pending, have all the equity powers necessary to relieve from mere matter of penalty, can do complete justice in the case as well as equity. Against penalty or injustice he seeks no relief.

No reason is shown for the application to chancery. This court has no power to interfere with the courts of law in their proceeding relative to orator's accounting.

They have all the authority necessary to do complete justice, and there is no reason to suppose they will not properly exercise it.

Chancery has not only no authority to interfere in this matter, but there is not the slightest reason why it should, if it had. *Adams* v. *Adams et al.*, 22 Vt. R. 50. The probate court and the courts of law are the only tribunals having cognizance of this matter, and are every way emphatically the proper tribunals, having all the powers and authority both legal and equitable, peculiarly fitting them for such service. There is where the law has placed it, and no where else.

The demurrer must therefore be allowed.

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This case was held under advisement, until the circuit session at Woodstock, in September, 1852.

The opinion of the court was delivered by

REDFIELD, J. The facts alledged in this bill, no doubt make, upon the whole, a considerable impression upon the mind, that the orator has really not done any thing worthy of severe reprobation. But in saying that, we should be mindful of the maxim *audi alteram pastera*, or that one story is good, until another is told.

But in examining the case in detail, with a view to apply to it the exact rules of chancery law, it is not perhaps easy to say precisely how it is to be determined in the court of chancery, until the proceedings at law are closed, and it is thus made judicially to appear, that the orator is remediless, at law. We think it will be found upon investigation of the case in the court of probate, that the equity powers of that court are altogether adequate to granting full redress.

The object of the bill, judging from the general scope of the stating and charging parts, as well as the specific prayer for relief, seems to be to take the whole matter of accounting between Calvin French and defendant, out of the court of probate, and adjust it in the court of chancery, and pass a final decree, for the party found ultimately in arrear.

This is asked upon two grounds.

1. That the defendant has obtained an *exparte* decree of account in the probate court, by taking an undue advantage of a confidence existing between the parties, in regard to the matter.

2. That the whole matter is in the wrong probate district, and that the Rutland probate court have no jurisdiction.

In regard to the first ground for bringing the bill, it is now considered that the probate court, so long as the matter is pending either in that court, or in the common law courts, on the bond, have full power to re-examine any of their former decrees in the premises, and correct all errors, irregularities and mistakes. And possibly, this power of re-examination extends even beyond this. *Adams* v. *Adams*, 21 Vt. R. 162. *Rix* v. *the heirs of Smith et vice versa*, 8 Vt. 365. 9 id. 240.

It seems to be taken for granted in the bill, that a decree in the probate court that an administrator ought to render his account, is

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a final decree, from which an appeal lies in the first instance. This is not regarded as a final decree in any other court, and we see no good reason why it should be, in the probate court. Such a decree, from its very nature, must be, to a great extent, interlocutory. It has been regarded as affording a sufficient basis upon which to predicate a suit upon the bond, given to secure the performance of the orders of the probate court. But it fixes nothing with certainty. There must be some hearing as to the amount due, either in the probate court, or in the common law courts, and in either case, the plaintiff's liability may be reduced to a merely nominal sum, which would render it quite needless to pursue any redress in the court of chancery.

We see no reason to doubt that upon the facts stated in the bill being shown to the probate court, that court would give the party a hearing, and if so, we see nothing in the case, which would clearly transcend the power of that court to adjust. It would, we know, place the matter in a very awkward position to dismiss the plaintiff's bill here, and then turn him out of court, in the probate court, on appeal. And to avoid the possibility of any such contingency, we shall probably require this suit to be retained in the court of chancery, until the proceedings in the court of probate are closed.

And if this were a case, where the party had clearly been deprived of his appeal, in due time, by fraud, accident, or mistake, the statute allowing a remedy, by petition to this court would seem to supercede the equitable jurisdiction, which has under very peculiar circumstances, been exercised in such cases.

If the court of probate and this court, upon the question being brought here, should hold, that the plaintiff in this case, upon a strict accounting, either as administrator, or attorney in fact, both of which matters, under the circumstances, must come into the same accounting, is not entitled to charge any considerable sums, which he has actually paid out for the benefit of the estate, or of his constituent, and solicits, in equity, ought to be re-imbursed, then very likely the plaintiff may be entitled to seek redress upon this bill.* And did we now see clearly, that any portion of this bill

* It would seem, that one who is administrator of an estate, against which he has claims, may bring in his claims against the estate, on his final accounting in the probate court, or present them to the commissioners, at his election, since it has been decided in *Adams* v. *Adams*, 22 Vt. R. that an allowance of such claims

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came within that description of claim, we might determine now, that the bill is to go to a final hearing to that extent. But we do not perceive any claim in that shape. The amount paid by the orator or administrator, which was really due from the intestate, but not allowed by the commissioners, having never been presented before them, is the only part of the plaintiff's claim which seems to afford any great difficulty, even upon his own showing. For we are not to suppose that any court could be so insane as to charge the plaintiff with the value of the furniture, and the few articles of personal use, by the ancestor, and which were *bona fide* kept for the heir, on account of the enhanced value growing out of that circumstance, as it was *bona fide* supposed by the administrator, and especially where the property so circumstanced had been handed over to the heir, and for years put to his use, without objection, after he come of full age. And if the probate court should actually charge the plaintiff, under these circumstances, and the decree should finally be affirmed in this court, we do not see how the party could have any redress, in a court of equity.

But in regard to the payments, made by the administrator, of debts not allowed by the commissioners, his right to ask an allowance must, we should suppose, depend very much upon the state of facts, in the particular case or cases.

If the claim had been disallowed by the commissioners, there could be no question whatever, that an administrator who should presume to pay it could not charge it, at least if done after the right of appeal had lapsed. So too if the claim had become clearly and absolutely barred, by not being presented to the commissioners, so that there remained to the claimant no further right to petition the probate court to open the commission for allowing claims, if such a state of things ever exists, until after the final settlement and distribution of the estate, the administrator should not be allowed any discretion. And we do not intend to say that the administrator can in any case be allowed to charge for payment of claims not preferred ones, when not allowed by the commissioners.

by commissioners, is not in the nature of a valid judgment, the claimant also representing the estate. Probably the more convenient practice is to have such claims allowed by the commissioners, and nothing more was intended to be decided here, upon that point, than had been already decided in the case referred to.

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But it occurred to us, during the argument, that if the administrator found a claim, not allowed by the commissioners, but which was clearly and notoriously due, and where no doubt could be entertained, the probate court would extend the commission for the purpose of giving an opportunity to present it, and where no question could be made, that it would be at once allowed, if under such circumstances it should be paid in the utmost good faith, it would surely savor of extreme justice, that the administrator should *not* be allowed the payment in his account. And if a claim under these precise circumstances cannot be allowed the administrator in his account, in the probate court, it will certainly merit grave consideration, whether a court of equity ought not to decree some remedy. This is the only point of the case which looked to us like requiring any equitable interference with the proceedings in the probate court, and we are inclined to believe the powers of that court are fully adequate to afford relief here.

The second ground for bringing the bill, we suppose was settled in this court by holding the bond valid. And this we understand to have gone upon the ground that if the defendant did not object to the jurisdiction, the plaintiff who first sought it could not. But if there were no jurisdiction whatever in the probate court, it would not lay the foundation of any resort to a court of equity, as it seems to us.

Decree of chancellor reversed, and case remanded to the court of chancery, to be retained until proceedings are ended in the court of probate, and then, if the orator elects to proceed, the defendant is to answer without terms, and if not, the bill is to be dismissed without costs.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF ORANGE,

MARCH TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

THE CONNECTICUT & PAS. RIVERS RAILROAD CO. *v.* ADMINISTRATOR OF ELLIS BLISS.

Audita querela. Bail. Administrators.

When the basis of an *audita querela* is altogether personal, it will die with the person.

And in such a case, the bail upon the recognizance cannot be held.

Writs of error and *audita querelas*, when they go to the foundation of the judgment, may be prosecuted by executors and administrators.

COMPLAINT for costs, for not entering and prosecuting an *audita querela* commenced by the intestate, Ellis Bliss, duly prayed out and served on the plaintiffs, and made returnable, June term of the county court, 1851. The said Ellis Bliss having deceased

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prior to said June term, and said administrator, Ellis Bliss, Jr., was appointed in May 1851. The said administrator having neglected to enter said *audita* in court, and to become party to the same, the plaintiffs took out a citation at the June term, 1851, and caused the same to be duly served on the said administrator, who appeared January term, 1852, and filed a motion to dismiss said proceedings and that the defendant have his costs. The court dismissed the same, and rendered judgment for the administrator to recover his costs.

Exceptions by the plaintiffs.

Parker and Underwood for plaintiffs.

The *audita querela* named in the bill of exceptions, was brought by the intestate to set aside an execution obtained in plaintiffs favor, or dismission of the intestates appeal from the award of the Railroad Commissioners. This execution was superceded by order of the judge allowing the *audita.* For the prosecution of the *audita,* a recognizance was taken conditioned "for the payment of *intervening damages and costs,* if the complainant failed to prosecute to effect." Comp. Stat. p. 292, Sec. 7.

1. It is insisted the death of the intestate did not prevent the entry and prosecution of the *audita,* by his administrator. And the administrator having neglected to do this, the plaintiffs had the right to give notice to him to so do, and on failure to have their costs taxed against him. Comp. Stat. p. 341, Sec. 10—p. 223 Sec. 32, pp. 343 & 344, Sec. 24 & 25. 1 Chit. Pl. p. 57 & 58. Fuller on Exrs., pp. 431, 2, 3, & 4. 3 Bacon's Abridg. 439. 2 Stephens N. P., p. 1885. The case of the Audita is within the equity of Sec. 10, above cited, as to survivorship.

2. Unless the plaintiffs are allowed to enter the suit for costs, (the administrator neglecting to presecute,) the plaintiffs are not only liable to lose their taxable costs, but a remedy *on the recognizance* in the *audita, for intervening damages,* which in this case, is the loss of the amount of the original execution, by reason of *its being superceded and so delayed* until the death of Bliss. This *damage* was what was expressly provided for by the recognizance. But if the case cannot be brought upon the record by the plaintiffs, (the administrator refusing to enter the suit,) how and when are plaintiffs to have a *scire facias* on the recognizance?

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R. McK. Ormsby for defendant.

The citation should be dismissed.

1. Because there was no action pending, when this citation was served on the defendant. No *living* person, after service of his process in any case, is bound to enter the same in court. If he refuse or neglect to enter, after service, the statute provide that the other party may make complaint for costs; not call in, or force him to proceed. When *pending*, the administrator may be called in to prosecute, or defend, as the case may be. The plaintiff being dead before entry, (the writ being served,) there is no statute giving administrators right of complaint for costs.

2. This cause of action died with the decease of the plaintiff to the writ of *audita querela*. There were no rights between the parties which could survive.

By the Court. In this case it seems to us, that the basis of the *audita querela* being altogether personal, did die with the person, and that the administrator could not have prosecuted it, after the death of the intestate. And so it could not thereafter be determined whether the plaintiff had a good ground of bringing the *audita querela*, and so the case must of necessity die with the plaintiff, and the complainants have no ground to claim to hold the plaintiff in the *audita querela*, or his bail upon the recognizance, after suit has been prosecuted as far as the law requires; i. e., till by a providential occurrence the writ became useless, or the remedy was needless, and the very thing it was intended to hinder became impossible.

We have no doubt writs of error and *audita querelas*, may be prosecuted by executors and administrators, when they go to the foundation of the judgments.

The complainant has no more ground of complaint here than in any case where the plaintiff, in a personal action dies, after having given bail for costs, or if appealed or reviewed for intervening damages. Some assumpsits survive, and some, as for breach of promise for marriage, do not.

Judgment affirmed.

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Araunah Spear v. The Town of Braintree.

Grand list. Errors in list. Liability of towns.

Under the present law, the alterations made in the grand list of the several towns, by the committee of the legislature to make the state average of the grand list, only affect state taxes.

Where the errors and defects in the list are accidental or *bona fide*, it will not render the list void, as a basis of taxation.

And in an action for money had and received, or in case, the plaintiff cannot recover more than his actual damage resulting from the irregularity in the list.

In an action for money had and received, even where there is irregularity, the plaintiff cannot recover of the town for money paid for State taxes, or State school taxes.

The provision in the statute in regard to the sixth column of the list has reference to a time prior to the county average, being required to be deposited, by the listers in the town clerk's office, before the first of July, and the clause of the statute that says, that this shall be the amount upon which all taxes shall be assessed, has reference to those years, in which there is no appraisal of real estate, or else it is to be qualified by what follows, that the county average shall be added or deducted for all taxes, and the State average, for State taxes.

Assumpsit for money had and received. Plea, general issue and set off, and referred by rule of court, to a referee, who reported substantially the following facts:

The plaintiff claims to recover back of the defendants certain sums of money paid by him for taxes assessed upon his property, according to the grand list of said town, which list he alledges to be imperfect and void.

It appeared that the grand list of the real estate for the town of Braintree, for the year 1842, as made up in the first instance, and adopted by the county averaging committee, was $229,995,00 on which the State committee, appointed by the legislature, for that year, ordered a deduction of 8 per cent., reducing said grand list to the sum of $211,595,40, and that this deduction was made in the said grand list, by the listers of said town prior to December 10th, 1842, and that all taxes, including State, State school, town and county taxes, were assessed upon the grand list of real estate so reduced by the deduction of 8 per cent.

The plaintiff insisted, that such assessment was irregular, and

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that the list as established by the State committee was the basis for assessing State taxes only. That the plaintiff paid the collector of taxes for said town, in the year 1844, 5, 6 & 7, for town taxes $28,63, and interest added to January 20th, 1852, $9,02 and in all, $37,65.

For State taxes in said years, $7,14, interest added, $2,10, is in all, $9,24.

For State school taxes, $4,54, interest added, $1,35, is in all $5,89.

It also appeared, that the grand list of real estate for said town in 1847, was ordered to be increased by adding 3 per cent. thereto, by order of the State committee for that year, that such addition was not made to the lists in the year 1847, and that taxes were assessed in 1848 upon the list as originally made up by the listers without the addition of the 3 per cent. The plaintiff paid in 1848, for taxes assessed on said list of 1847:—

Town tax, $5,94, interest added, $1,06, in all, $7,00.
State tax, $1,42, interest added, 0,24, in all, $1,66.
School tax, 0.95, interest added, 0,15, in all, $1,10.

It did not appear, whether the order of the State committee adding 3 per cent. in 1847, was certified to the listers in season to have been complied with by said listers before completing the same, or before the 10th day of December, of that year or not. The plaintiff, during all the years in question was assessed upon real estate only, with the exception of his poll.

Under the defendants plea in offset, the referee found the plaintiff indebted to the defendants on the 20th day of January 1852, in the sum of $28,82 on a previous note. And if the court are of opinion that all the taxes herein named, were legally assessed, then the referee finds due to the defendants from the plaintiff, the said sum of $28,82.

But if the court should decide, that the town taxes only can be recovered, and that all of these, both on the lists of 1842 and '47, should be refunded, then the referee finds due plaintiff, $15,83.—And if the court decides that the town tax assessed on the list of 1847, and that only can be recovered, then the referee finds due the defendants, $21,82. To the report, plaintiff excepted.

The county court, January term, 1852.—Collamer, J., presid-

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ing—rendered judgment on the report for the defendants to recover on their offset, twenty dollars and sixty-seven cents damages and their costs.

Exceptions by plaintiff.

P. Perrin and E. Weston for plaintiff.

This was an action of assumpsit brought to recover the amount of certain taxes, assessed by the selectmen of said town and paid by the plaintiff, which he alledges were illegally assessed, and the lists and taxes are void.

The taxes for the years 1843, 4, 5, 6 & 7, were assessed upon the grand list of said town upon the basis of the State equalising committee who ordered a deduction of 8 per cent. upon all the real estate in said town, whereas they should have been assessed either upon the town or county valuation for all purposes, except State taxes, the valuation of the legislative equalizing committee being the proper basis for State taxes *only*. Statute of 1841, Sec. 18, being the same as Compiled Stat., p. 459, Sec. 46. See also Sec. 49—also Laws of 1851, p. 38, Sec. 3.

The taxes assessed upon the grand list of 1847, payable in 1848, as well as the list of 1847 are void, for the reason that the order of the legislative equalising committee adding 3 per cent. to the real estate in said town was entirely disregarded by the listers, and was not so added. *Henry* v. *Chester*, 15 Vt. 460. *Downing* v. *Roberts*, 22 Vt. 455.

J. P. Kidder, J. B. Hutchinson and S. M. Flint for defendants.

1. The taxes collected previous to 1848, were made on the list of 1842, agreeably to the decision in the case of *Henry* v. *Chester*, 15 Vt. 460, and agreeably to the laws of this State as there explained. "The list was not complete until the alterations, required by the county and State committees were made. Until that time, it was merely in an inchoate state—so imperfect as no more to form the basis of any legal tax, than if it had been returned at any former stage in its progress," p. 469. *Collamer* v. *Drury*, 16 Vt. 574.

Comp. Stat. p. 460, Sec. 50, makes it the duty of the listers to complete and return the list *as finished* to the office of the town clerk, on or before the first Monday in December, in each year.—

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By Sec. 44, p. 118, the selectmen are directed to make out State, county and town taxes uniformly and proportionably on the *grand list.* There is no statute requiring two lists in each town. In construing statutes, the rule of construction is to ascertain what was the intention of those using the language to be gathered from the language used, taken in connection with the whole subject and having reference to *all* that is said on the subject. *Catlin* v. *Hull,* 21 Vt. 152. Comp. Stat. p. 456, last part of Sec. 28.

2. The taxes that were collected for and went into the State and county treasury, cannot be recovered of the town—at any rate in this form of action.

3. *Quere.*—Whether the State school taxes can be recovered of the town. A school district is declared to be a body politic and corporate as much as a town, and this money was collected for and went into the treasury of the several school districts, and that by State authority directing a tax of nine cents on the dollar of the grand list, each year, for the use and benefit of such districts.—Comp. Stat., p. 472, Sec. 1. p. 153, Sec. 68. *Perry* v. *Dover,* 12 Pick. R. 206.

The opinion of the court was delivered by

REDFIELD, J. The important question in this case, is, whether the alteration made in the grand list of the several towns, by the committee of the legislature, is to be regarded, in assessing town taxes. It is certain that was so under the Revised Statutes, p. 546 § 18; "And such listers shall then proceed to finish their "lists, by making the additions, or deductions, so made by the "county and State average, and make out one entire list, and re-"turn the same to the town clerks, by the tenth of December—on "which, State, county and town taxes shall be made." But the present law, which has been in force since 1841, provides that the list averaged by the State committee "should be the list upon "which *State taxes* shall be made." And the present law contains also an express provision, that the appraisal of real estate, after being averaged by the county committee of listers, "shall "stand for the valuation of real estate for the succeeding five "years;" and no such provision whatever was contained in the Revised Statutes.

This important alteration in the terms of the Statute, must have

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been intentional, and we have no means of knowing, why it was done, or for what purpose, except the one so clearly indicated in the terms used, that the State average should only affect State taxes—we see no good reason why it should be made to affect other taxes, but it is certain it did under the former law. The list under that law was not complete until these additions and deductions were made. And for that reason, among others, the list in the case of *Henry* v. *Chester*, 15 Vt. 460, was held *imperfect and incomplete.* In that case, be sure, both the additions required by the county and State committees were omitted, and where the county committee required ten per cent. to be added to buildings and lots, the listers actually *deducted ten per cent.* and all this was evidently done designedly, and with the purpose of oppressing the plaintiff, whose list of personal property was very large, his taxes for town purposes, being with interest, between $700 and $800. That case was decided, as it was, chiefly upon the ground that the defects in the list could not be fairly regarded as accidental, or *bona fide*, as is there expressly said. In the present case, the deduction of eight *per cent.* from the list of real estate for 1842, and four years succeeding, for all taxes, but State taxes, is certainly not according to the requirements of the law then in force. But the list was complete, for all other taxes but State taxes before that. It was in no sense inchoate, or imperfect, as in the case of *Henry* v. *Chester*, and there is every reason to believe this was done *bona fide*, or that it might have been so done. We could not, therefore, regard this case, as coming within the principles of the case of *Henry* v. *Chester*. And upon principle, we think the list, for such an error ought not to be regarded as void; but that it should be held as a mere mistake, like an error of computation in assessing a tax.

And where the action is for money had and received, as in the present case, or in case which are equitable actions, it was held on the last circuit, in Caledonia county, in the case of *Fairbanks* v. *Kittredge* and others, that the plaintiff could not recover more than his actual damages, resulting from the irregularity. And in the present case, as the plaintiff was assessed chiefly for real estate, it would seem probable, that he was benefitted by the deduction in 1842 *et seq.* We do not intend to say, that for such irregularity, as the present, the plaintiff could have any remedy except in assump-

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sit or case, very likely he could not. But clearly, in this form of action, he could *not* recover for a mere circumstantial error, which had, in fact, operated to his advantage. And this principle is far more obviously applicable to a case of this kind, than the case cited from Caledonia county.

The list of 1847, was correct, except for State taxes, and we do not think the plaintiff can recover in this form of action for money paid for State taxes. That is not money, which the town ever received to retain—so of the State school tax—the town only collect it, as agents, and were not liable to this action after having paid it to the school district.

And here, too, the plaintiff is complaining of an omission, which operated to diminish his State tax, and where there is no pretence of bad faith, and no proof that the addition was ever properly certified to the listers.

From all which, it is evident, the judgment of the court below is more favorable to the plaintiff, than it would be likely to be upon the basis of our decision, and we shall affirm the judgment, unless the plaintiff thinks a new trial will be beneficial to him, in which case, we think he is entitled to it, as it does not absolutely appear with entire certainty how the defects in the list might affect the plaintiff.

The provision of the statute in regard to the sixth column of the list, has reference to a time prior to the county average, being required to be deposited, by the listers, in the town clerk's office, before the first of July. It is said to be sure, that this shall be the amount upon which all taxes shall be assessed. But this has reference to those years, in which there is no appraisal of real estate, or else it is to be qualified, by what follows, that the county average, shall be added or deducted, for all taxes, and the State average, for State taxes.

The plaintiffs elected to have judgment reversed and the case remanded for trial.

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ARAUNAH SPEAR *v.* EDMOND TILSON.

Grand List. Collector. Return. Adjournment.

The neglect of a collector of taxes to make return in writing, of his proceedings on his warrant, can have no effect to make him a trespasser *ab initio*. Nor is he bound to certify such return to the person whose property has been taken to satisfy such tax, even though requested so to do, by the owner of such property, and such return if made, would not be proper evidence in his justification.

In all cases the proceedings of the collector may be proved by parol, when necessary to his justification.

Such officer may lawfully adjourn the sale of such property, and his powers for that purpose, are identical with those of an officer having an execution for collection.

It was not necessary that listers should make oath to the correctness of the grand list, prior to 1841.

The existence and contents of a grand list which is lost or destroyed, may be proved by parol.

TRESPASS for taking plaintiff's mare. Plea, the statute of limitations, general issue and notice of special matter, which was referred, under a rule of court, to a referee, who reported:

That the mare was taken by the defendant as collector of a town tax in Braintree, some weeks previous to March 18, 1844, and posted for sale under a warrant for the collection of taxes, but was left in the custody of the plaintiff, until the day of sale, which was March 18, 1844. That on that day the defendant took the mare from the plaintiff and sold her at auction, which is the taking complained of.

The writ in this suit was issued March 18, 1850, and the referee decided that the statute of limitations was a bar to the action.

The referee also found that the defendant was, at the time of the taking of the mare, collector of Braintree, that the plaintiff was an inhabitant of said town, and liable to be taxed therein, that he was legally assessed on the grand list, in the years 1840 and 1841, that taxes were legally voted by said town, on said lists, and that legal tax bills were thereon made, and placed in the hands of the defendant, that the plaintiff refused to pay the taxes assessed against him, that the defendent took the mare by virtue of said

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tax bills and the warrants attached to them, that the plaintiff did not pay said taxes, that the defendant legally advertised said mare to be sold, February 5, 1844, when he legally adjourned the sale to March 18, 1844, at which time he sold said mare to Samuel Spear, the agent of the plaintiff for that purpose, who was the highest bidder for her.

That the defendant on the day of the sale, and after the sale, gave to said Samuel Spear as such agent, an account in writing, of the tax, costs and commission, and therein accounted fully for the proceeds of said sale, that the defendant made no return in writing, upon his warrant, or otherwise, of the sale or other proceedings, under said warrant, and that the plaintiff applied to the defendant during the week previous to commencing this suit and requested him to make out and certify such a return, which the defendant refused to do.

The referee also found that at the time of trial there was no signature of the listers to the grand list of 1840, that it was mutilated and portions of it were entirely gone. The referee permitted the defendant to prove by parol, that said list was properly certified when returned to the town clerk's office, although such evidence was objected to by the plaintiff, and that such certificate had been destroyed.

The referee also reported that no evidence was adduced to show that the oath of the listers was ever certified on the grand list of 1841.

The county court, January term, 1852, COLLAMER, J., presiding, accepted the report, and rendered judgment thereon for the defendant. To which the plaintiff excepted.

P. Perrin and *E. Weston* for the plaintiff.

The statute of limitations had not run on the action. *French* v. *Wilkins*, 17 Vt. 341. *Weeks* v. *Hall*, 19 Conn. 376 and cases there cited.

The defendant had no authority to adjourn the sale without the consent of the parties, and by doing so, and afterwards selling the mare, he rendered himself liable in trespass *ab initio*. He also made himself liable by refusing to make and certify a copy of his doings. Com. St. 464 § 10 and 13.

The referee erred in receiving parol testimony of the certificate of the listers.

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It does not appear that the grand list of 1840, was ever sworn to by the listers.

J. P. Kidder, J. B. Hutchinson, and *S. M. Flint* for defendants.

The statute of limitations had fully run. Com. St. 378 § 5. 7 Comyns Dig. 397. Doug. 465. *Castle et al.* v. *Burdett et al.*, 3 T. R. 623. *Presby* v. *Williams*, 15 Mass. 193. In the matter of Wellman, 20 Vt. 655.

The defendant is justified under his plea and notice. The statute requiring lists to be sworn to, did not come in force until Jan. 1842, and the referee did not err in admitting the parol evidence to prove the loss of part of the list.

The opinion of the court was delivered by

ISHAM, J. In this case, several questions have arisen under the general issue and notice, and a more difficult one, under the plea of the statute of limitations. The action is trespass for taking the plaintiff's mare, and was commenced on the 18th day of March, 1850, the same day the property was taken. The defense, under the general issue and notice, consists in having taken the property by the defendant, as collector of taxes by virtue of a warrant therefor. The proceedings of the collector and the legality of the tax, are to be taken as correct and legal, unless for causes urged, they are found otherwise.

The neglect of the constable to make a return in writing, of his proceedings on his warrant, with his certificate, and deliver the same to the plaintiff as requested, can have no effect to charge him in this action as a trespasser *ab initio*.

In no sense could such a return be considered as an official act. There is no statute requiring such return to be made or copy to be delivered, except when the delinquent is committed to jail, in which case a copy of the warrant, and his doings thereon, is required to be left with the keeper of the jail. In all other cases, his proceedings may be proved by parol, when necessary in his justification. This, of necessity, arises from the fact, that if he had made his return, it would not, for any purpose in his justification, be even *prima facie* evidence of the facts there stated. *Hathaway* v. *Goodrich*, 5 Vt. 65.

The Comp. St. 464 Sec. 13, requires the officer, after such sale, to

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return the overplus, if any there be, to the former owner *on demand* and also to furnish him an account of such tax and cost. It is stated in the report, that on the day of sale the defendant gave to Samuel Spear, a person whom the referee has found to be the agent of the plaintiff for that purpose, an account in writing, of the tax, costs and commissions, and accounted fully with him on that occasion for the proceeds of that sale. This was a full compliance with his duties, as required by that section of the act. Independent of this consideration the case does not show that he was ever requested to deliver this account, and it is only upon such request the duty arises. The agent did request a copy of the collector's return on the warrant, but this he was not bound to make or deliver.

Equally unavailing is the objection that the grand list of 1840, was not sworn to by the listers, or that parol evidence was introduced of the certificate of the listers, when it was lodged with the town clerk. There was no statute requiring the grand list to be sworn to by the listers, until the year 1841. And whenever it becomes necessary to prove the existence or contents of the grand list in case of its destruction or loss, we entertain no doubt that the fact may be shown by parol proof.

The objection that the sale was adjourned by the collector, from the 5th of February to the 18th of March, 1844, must also be overruled. The Stat. p. 464 Sec. 12, specifies the time within which it shall not be sold, and this for the benefit of the delinquent, to enable him to redeem the property, by the payment of the tax. Beyond that time, the right and power of adjournment rests in the exercise of a sound discretion of the collector. Such an adjournment may be necessary for the want of bidders, or to prevent the property from being sacrificed. And the right to the exercise of that power is the same as that of any officer having property attached on execution. *Tomlinson* v. *Wheeler*, 1 Aik. Rep. 194. 15 Vt. 211. It may be exercised to such an extent as to make him liable for neglect. But he would not thereby become a trespasser *ab initio*. The defense is sustained under the general issue and notice. This renders it unnecessary to decide the question arising under the plea of the statute of limitations, or the propriety of filing that plea, after a special notice under the general issue.

The judgment of the county court must be affirmed.

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ELLIS BLISS *v.* CONN. & PAS. RIVERS RAILROAD COMPANY.

Appeal. Lunacy. Inebriety.

Whenever a man looses his memory and understanding, he is entitled to legal protection, whether such loss is occasioned by his own imprudence or misconduct, or by the act of providence.

PETITION for a writ of *certiorari*. It appeared that the petitioner for a long time was deprived of the proper exercise of his mental faculties, by continued intoxication. The case is fully stated in the opinion of the court, which was delivered at the Special Term, September, 1852, at Woodstock.

R. McK. Ormsby for petitioner.

Underwood & Parker for defendants.

The opinion of the court was delivered by

ISHAM, J. In this application for the writ of *certiorari*, the petitioner complains of a decision of the county court in dismissing an appeal from the award of commissioners in assessing damages for land taken by the corporation, in the construction of their railroad. The difference of between two and three hundred dollars in the second appraisal over that of the first, is quite satisfactory that the petitioner has reason to complain of injustice in the first appraisal; so that the case rests upon the question whether there was error in the proceedings.

The appeal was dismissed upon the ground that it was not taken within the time limited by the act. But it is insisted by this petitioner that he was, during that time, within the saving clause of the act *as being insane*, and that the appeal was taken in due season after that disability was removed. The 8th Sec. of the act of incorporation provides "that the owner of real estate, who "feels aggrieved by the decision of the commissioners, may within "ninety days from the making of such decision and notice thereof, "or from the removal of the disabilities in the preceding section "mentioned, appeal to the county court, &c." The disabilities there mentioned "are married women, infants, idiots or insane."

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The county court, in passing upon this subject, found the facts true in relation to the condition and mind of the petitioner, as stated in the various depositions which are made part of the case, and when the court use the expression in the bill of exceptions "that they "did not consider him as positively insane," we are not to understand that, as a *fact* found in the case, but simply as the expression of an opinion that a mind thus affected and impaired, is not within the provisions of the act.

In dismissing the appeal, the court evidently proceeded upon the ground that no case would fall within that provision, short of settled frenzy or positive distraction and delusion of mind, and when that state was not produced by the party's own voluntary act or excess. That provision of the act should evidently be liberally construed, and should include all cases that are within its spirit, as well as its letter. Lunatics, and persons *non compos*, are not mentioned, and yet they would evidently come within its provisions. The term *insane*, by a distinct provision of our statute p. 68 Sec. 6 and p. 407 Sec. 11, includes "idiots, persons *non compos*, lunatics, and distracted persons," and this definition of the term by statute, is declaratory of the common law. In Co. Litt. 247, there is given a classification of the different cases of mental derangement, and in that, express mention is made of those who by inebriation and drunkenness, have deprived themselves of their memory and understanding. And whatever may have been the rule formerly, that such a person was not within legal protection, unless as was afterwards held, that state was produced by practices of the other party, yet the law is now well settled otherwise, and so far as legal capacity is concerned, it is immaterial from what causes such a state of mind arises, whether by the act of providence, or the party's own imprudence. It is the state and condition of the mind itself, the law will notice, and not the causes that produced it. 1 Story's Eq. 247 § 225. 2 Kent's Com. 563. 5 Mason's U. S. Rep. 28. 2 Aik. Rep. 167. 16 Vt. 335. And as the object of this provision of the act was to save the rights of those who have not legal capacity to protect them, those who are deprived of that capacity, from whatever cause it may arise, are included within its provisions.

It is not, however, every stage of inebriation that is attended with legal incapacity. It is not so, when the individual is under

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a *mere temporary excitement*, unless it has been carried to that degree which may be called excessive, and the party is deprived of his reason and understanding. In such case, when under that excessive excitement, Justice STORY remarks, 1 Eq. Juris. § 231, "That no contract *or other act* can, or ought to be binding," *so too* if the party is not under that temporary excitement. Yet if by such repeated practices, his mind has become habitually diseased, his perceptive powers seriously affected, if he has become divested of his reason, and unconscious of his external relations, he has then assumed the character of one deranged, of a mind incapable of healthy action, and has lost that legal capacity that renders him responsible for his acts. Thus it is said in 3 Bac. Arb. 526 (a) "That though one mad by drunkenness is not "entitled to legal protection, yet if by one or more such practices, "an habitual or fixed frenzy be caused, though this madness was "contracted by the vice and will of the party, the habitual and "fixed frenzy thereby caused, puts the man in the same condition "as if the same was contracted at first involuntarily, and is the "same as any other frenzy, and equally excuseth him." The same is said by Lord COKE, Co. Litt. 247. Dean's Med. Juris. 585. Jac. Law Dict. 371. 3 Amer. Jurist 15.

With these principles in view, we are led to the examination of the question, whether this petitioner was in that state of mind that places him within the saving provisions of this act. No one can read the depositions of Doctor Carpenter and Poole, and the statement of Edward P. Bliss, and have any misgivings on the subject, for they are full, as to the extent of his inebriation and the effect it had produced on his mind. We learn as facts in the case, that for a long period, the petitioner was not only excessively intemperate, but to that extent as to render him unfit and incapable of transacting business that required thought or memory. That for most of the time during the period in question, he was out of his mind, so crazy as to require close attention to prevent his doing mischief, threatening to commit personal violence upon others, to burn his buildings, and was necessarily held in restraint by force, that he was rapidly verging towards delirium tremens, and incapable of deliberating upon those matters and weighing their consequences, with which his interests were intimately connected. And in relation to the subject matter of this appeal, we also learn

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"that the members of his family often tried to talk with him about it, but could never communicate anything to him, or make him understand anything on the subject, until they were finally informed it was too late to do anything." Such was his state and condition *at the time the land was taken* by the commissioners, when it was *appraised and notice given*, and when the appeal was actually taken. For it was taken by his sons, when he was incapable of being consulted, but he was anxious to prosecute the same when afterwards he had in some measure recovered the proper exercise of his mind. It is difficult to conceive of a case, not merely of excessive inebriation, but of insanity and legal incapacity arising therefrom, if this is not one. If an action had been brought upon a bond or contract executed during this period, no court would hesitate to find a total want of that assent of mind necessary to make a binding contract. For such assent implies "a free and serious exercise of the reasoning faculty, and the power, both physical and moral, of deliberating upon the matter, and weighing its consequences." And Ch. Walworth says, 1 Paige Rep. 580, "That if a person for a considerable length of time be so intoxi-"cated as to deprive him of his ordinary reasoning powers, it is "*prima facie* evidence that he is incapable of managing his affairs." And Lord ELLENBOROUGH, in *Pitt* v. *Smith*, 3 Camp. Rep. 33, held that an agreement made under such circumstances was void, and said "That such person had not an agreeing mind," and which he adhered to in *Fenton* v. *Halloway*, 1 Stark. Rep. 126. This has also been so held at law, in this State, 2 Aik. Rep. 167, and in equity in the case of *Conant* v. *Jackson*, 16 Vt. 335 and 1 Story's Eq. Juris. Sec. 227, 8, 9. And a party will be relieved from any conveyance or contract made under such circumstances.

It would be exceedingly inconsistent to say, that the law under such circumstances, will protect an individual from liabilities arising *ex-contractu*, and yet will not protect him in his title and enjoyment of his real estate, or will suffer it to be taken from him by proceedings purely *in invitum* for a greatly inadequate consideration, by a neglect to take an appeal within a limited time, when during that time, he was unable to understand the nature of the proceedings instituted for that purpose, or the consequences of his neglect. The right of the corporation to take this land is given by the legislature in the exercise of their right of sovereignty, and they

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are required by their charter, first to negotiate with the landholder, as to the amount of compensation, this failing, the property is to be appraised, subject to the right of appeal. In all these proceedings, there is required on the part of the landholder, the exercise of as sound and healthy a mind, and of reason as unimpaired, as is required in making any contract or disposition of his estate. And after the land has been taken by the corporation and appropriated to their own use, it can but be regarded as a violation of moral duty, to permit it to be taken from him for an inadequate consideration, or to deprive him, under such circumstances, of his right of appeal. We think, therefore, the appeal should not have been dismissed, and that the petitioner should have been permitted to prosecute the case under that provision of the act giving ninety days for appealing, after the disabilities therein mentioned are removed.

This renders unnecessary, the examination of the other questions presented, and on which we give no opinion. The result is that there is error, and that this writ must issue, and the judgment of the county court, in dismissing the appeal, must be reversed.

E. P. & J. W. Bliss *v.* Connecticut and Pas. Rivers Railroad Company.

Service by indifferent persons. Defective service. Motion to dismiss. Abatement. Amendment.

Where the defects, sought to be taken advantage of, are in the form of the authority, or in the service of the writ, it should be by plea in abatement.

But when the defect, complained of, is a total want of an essential ingredient either in the writ, or service of the writ, and that apparent upon the record, it may be taken advantage of upon motion to dismiss.

Amendments to the record, can be made, as well on motion to dismiss, as on a plea.

This was an action on the case. The defendants filed in court the following motion to dismiss. "And now the defendants come

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"and move said cause to be dismissed, because said writ purports to "have been served by William Barker an indifferent person, and "by no other person, or officer, and it does not appear that said "Barker was in anywise authorized to serve said writ, and de- "fendants have never accepted service of the same. Therefore, "they pray said suit and said writ be dismissed, and for their "costs."*

This motion was filed within the rule of the county court, for filing pleas in abatement and dilatory pleas. The return upon the writ was signed William Barker, indifferent person. The writ was not directed to him, nor did it appear from the writ, that he was in any way authorized to serve the same.

The county court, January term, 1851, overruled said motion, and rendered judgment that the defendants answer over. To which decision of the court, in rendering such judgment, and overruling said motion, the defendants excepted.

Parker and Underwood for defendants.

This method of taking advantage of defects apparent on the record is familiar to our legislation. Comp. Stat., 242, 243, Sect. 5, 10 & 284, Sect. 1. So in the case at bar, all appears by inspection of the writ. We may as well take advantage of the defect by motion, as of the defect that the true day, month, &c., are not noted on the process as was done in *Dassance* v. *Gates*, 13 Vt. 275. *Hubbell* v. *Gale*, 3 Vt. 266. The statute is, "the writ of "process may be directed to and served by an indifferent person "being named." Why directed to him? because only by the direction does he get his authority; and only by that can this court recognize his authority to act. Why named? So that the court on inspection, may see it. No matter who makes the return or signs it, if it be not the person to whom directed and being named, it is no service, it is wholly void. If an authorization is void, if made before the writ is filled, certainly a total absence of authority on a filled writ is equally bad. *Kelly* v. *Paris et al.*, 10 Vt. 261. *Dolbar* v. *Hancock*, 19 Vt. 388.

* The defendants, after verdict for plaintiffs, and before judgment thereon, filed a motion in arrest, alledging that the declaration and matters therein contained are not sufficient in law. The case turned upon the motion to dismiss, above recited, and the motion in arrest was not passed upon by the court.

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Generally, if matters of abatement are apparent on the record, the exception may be taken by motion. *Nye* v. *Liscomb*, 21 Pick. 263. *Guild* v. *Richardson*, 6 Pick. 363. *Simonds* v. *Parker* 1 Met. 508. *Jacobs* v. *Millen*, 14 *Mass.* 132. *Ames* v. *Winsor*, 19 Pick. 247. *Bullard* v. *Nantucket Bank*, 5 Mass. 99. *Hawks* v. *Kenebeck*, 7 Mass. 461. *Hart* v. *Fitzgerald*, 2 Mass. 209. *Wood* v. *Ross*, 11 Mass. 271. *Gage* v. *Gannett*, 10 Mass. 176.

When there is no legal service of the writ, and the defect is apparent on the record, the court will abate the writ. *Carlisle* v. *Weston*, 21 Pick. 535. *Tingly* v. *Bateman*, 10 Mass. 350. *Lawrence* v. *Smith*, 5 Mass. 362.

R. McK. Ormsby for the plaintiffs.

The motion to dismiss was rightly overruled, because the defect in service, if any, was not apparent of record. *Mitchell* v. *Starbuck*, 10 Mass. 6. *Gage* v. *Gannett*, 10 Mass. 176.

Since void, deputation is only matter of abatement, and if not so pleaded, the execution will not be void. *Kellogg, ex parte*, 6 Vt. 509. The language of the motion is argumentative. *Hill* v. *Powers*, 16 Vt. 516.

Any irregularity, or defect in service, must be pleaded in abatement. *Charlotte* v. *Webb*, 7 Vt. 38.

By the Court. In this case, the writ was served by an indifferent person, and no authority whatever appears for such service. The defendants moved to dismiss the action for want of service, therein alledging that the person serving the same, "does not appear to have had *any authority to serve the same*," and that the writ purports to have been served by such indifferent person, and that defendants have not accepted service.

If the defects complained of, were in the *form* of the authority, or in the service, it should clearly be pleaded in abatement, or it would be disregarded, but where the defect complained of, is a total want of an essential ingredient either in the writ, or service, it has been customary to take notice of it upon motion.

If the writ was not signed by any one having authority to sign writs, or not signed at all, or if it were signed by one having no authority whatever, or not served at all, and if these defects are in their nature incapable of cure by any supposable replication,

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we do not see why the defect may not be taken advantage of, by motion to dismiss.

And in the present case, if the form of the authorization were ever so defective, or if there were any mode known to the law, by which an authority to serve writs, could be conferred by an act not appearing on the writ, or if there were any supposable mode in which an indifferent person could serve a court writ, not directed to him by name, we should certainly feel called upon to overrule this motion, or to affirm the judgment of the county court doing so.

And under the circumstances of the present case, after verdict and judgment, if the judgment could fairly be affirmed, without seeming absurdly refined in escaping obvious and glaring defects, sufficiently apparent not to escape the notice of any one, and as fatal as any defect could be, we should certainly be inclined to do it. If this motion had not been filed strictly within the rule of the county court, we would presume the court overruled it for that cause. But we have not been able to find any such mode of escape.

And it seems to us the defect is one of *merits*, and that it is *entire* and not merely formal, or circumstantial, and that it is so apparent upon the record, that it is impossible to say it may not be taken advantage of by motion to dismiss, and that it is not curable by any supposable replication, and that it is therefore fatal even in this form.

The supposition which is the only one by which we have seen any mode of making out any service of the writ, i. e., that Barker might have been a constable or sheriff, if it had been true, should have been brought upon the record by an amendment.— This might have been done as well on a motion to dismiss, as on a plea.

With a sincere desire to escape the consequences of this motion at this late stage in the case, and an earnest effort to do so, we have found it impossible, and the judgment is therefore reversed and the suit dismissed. *Case* v. *Humphrey*, 6 Conn. R. 130, seems fully to sustain the view here taken.

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Solomon Dunham v. Michael Lee.

Trespass. Bailment. Fraud.

Where, by the terms of a written contract, B. has no power to sell a horse that A. has conditionally put into B.'s hands. If B. sells the horse, the very act of sale terminates the bailment, and A. has the right to take immediate possession, even if part of the purchase money has been paid, and retain it until the balance of the purchase money is paid.

And if B. had a right to sell, and the sale was so tinctured with fraud as to be voidable at the election of B., then A., as principal vendor, might do it.

Trespass for taking a certain mare. Plea general issue, and trial by jury.

On the trial the plaintiff, for the purpose of showing property in the mare, introduced a certain written contract, which was executed by one James Putney to the plaintiff, by the terms of which, the said Putney was to keep said mare six months and if he then paid the plaintiff twenty-five dollars, he was to have the mare one year more, and if he paid twenty-five dollars more at the end of said year the mare was to be the property of said Putney. The plaintiff then proved that the mare was immediately put into said Putney's possession and remained in his possession until the spring of 1850, when said Putney exchanged said mare and a harness with the defendant for a watch, and that the plaintiff took the mare out of the possession of the defendant and put her into the possession of one Bailey Putney, father of said James Putney, and in the same place where she had previously been kept for said James, and contracted with said Bailey Putney for the keeping of the mare for himself, the plaintiff; and that soon after the defendant took said mare out of said Bailey Putney's possession, which is the taking complained of.

The defendant introduced testimony tending to prove, that the plaintiff authorized said James Putney to trade said mare off, if he made a good trade and did not get cheated.

The plaintiff offered testimony tending to prove, that in making said exchange of said watch for said mare and harness, the defendant practiced fraud upon the said James, who was young and inexperienced, and among other things, that said mare was worth sixty dollars and said harness seven dollars, while on the other

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hand the watch, which the defendant exchanged therefor, which was apparently gold, was not really such, was of little or no value, not exceeding from three to five dollars, as was then well known to the defendant, but who represented the same to said James as of the value of sixty-five. To which the defendant objected, but the court admitted the testimony, to which defendant excepted.

The defendant introduced testimony tending to show, that before said exchange by said James to the defendant, he had paid plaintiff towards said mare, thirty-three dollars.

The defendant insisted as matter of law, and requested the court to charge the jury, that if the plaintiff gave said James Putney any license to sell the mare, he could not sustain this action.

The defendant further insisted, that if the first installment had been paid by said James, the plaintiff could not sustain this action, inasmuch as the time for which he had parted with the right of possession to the mare, by said writing had not expired.

The court declined so to charge the jury, but did charge them that the general property in said mare remained in the plaintiff, notwithstanding her possession by said James under said writing, and although said James had paid thirty-three dollars towards her, and that no license which the testimony tended to prove, as given by the plaintiff to said James Putney to sell the mare, would justify or sustain the defendant in acquiring this right or title of the plaintiff, by fraud practiced on James. If the jury found that in making said exchange the defendant was guilty of fraud, (so explaining what constituted fraud, that no exception was taken thereto,) then the plaintiff was justified in reclaiming possession of said mare, notwithstanding the time mentioned in said writing had not expired, and that for the taking by the defendant afterwards the plaintiff could sustain this action.

Exceptions by defendant, after verdict and judgment for plaintiff.

P. Perrin and *J. P. Kidder* for defendant.

1. The case finds that the mare was in the possession of the bailee Putney under contract, and for a specified time which had not elapsed, and we contend that the plaintiff, (having parted with his possession by contract for a given time,) had neither the possession, or right of possession sufficient to enable him to sustain this action though he had the general property in the mare. *Soper* v. *Sumner et al.*, 5 Vt. 274.

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2. The bailee had done nothing which was sufficient in law to determine the bailment, having done nothing but what the plaintiff authorized him to do "if he did not get cheated," and who shall determine the question whether he got cheated or not, the plaintiff or the law?

3. The taking by the defendant would not terminate the bailment so as to enable the plaintiff to sustain this action. It must be terminated by the act of the bailee. *Swift* v. *Mosely et al.*, 10 Vt. 208.

4. If the plaintiff gave permission to the bailee to dispose of the mare, as found by the exceptions, the sale would divest the plaintiff of even his general property in the mare.

5. The taking of the mare by the plaintiff out of the defendant's possession was in his own wrong, and gave him no additional right of possession.

6. The mare having been taken by the defendant from the same place where she had been previously kept by the bailee, there had been no change of possession.

7. Even if there were fraudulent representations on the part of the defendant in his trade with the bailee, still we are unable to perceive how that can effect the parties to this suit.

8. If there was fraud in the trade between defendant and the bailee it seems to be a mutual fraud. One practiced deceit in relation to the ownership of property, and the other in relation to value only, and the bailee did it by permission of the plaintiff.

J. S. Marcy and *C. M. Lamb* for plaintiff.

The contract between plaintiff and James Putney as evinced by the receipt, was in the nature of a bailment; such was its character and legal effect.

At the time James disposed of the mare, as stated in the bill of exceptions, the *condition*, in his contract of purchase with the plaintiff, on the performance of which the mare was to become the property of said James, had never been fulfilled or performed by said James; and a sale by him of the mare, under such circumstances, determined the bailment. *Bigelow* v. *Huntley*, 8 Vt. 151. *Swift* v. *Moseley*, 10 Vt. 208. *Grant* v. *King et al.*, 14 Vt. 367.

If James undertook to sell the mare under the supposed authority of the plaintiff, he acted in the matter as plaintiff's agent, and, in-

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dependently of the written receipt; and to make the sale effectual so as to bind the principal, the agent must in all things strictly follow his, the principal's, direction and authority; which the said James in this case did not do. 2 Kent's Comm. 620,621. *Huntington, Administrator* v. *Wilder*, 6 Vt. 334.

In attempting to sell the mare under the authority of the plaintiff, James *committed the very thing inhibited.* The sale was wholly unauthorised and conveyed no title in the mare to the defendant; and the bailment being determined by such sale by Putney, this gave the plaintiff the right to reclaim his property, although the period of the original bailment, as shown by the receipt, had not expired. *Bigelow* v. *Huntley*, 8 Vt. 151. U. S. Dig. Vol. 1, p. 243, ps. 60, 68, 69. *Swift* v. *Moseley*, 10 Vt. 208. *Sargent* v. *Gile*, 8 N. H., 322.

The fraud as shown by the case and found by the jury, *vicious, as it was in the extreme*, prevented the defendant from acquiring any property in the mare. *Hodgenden* v. *Hubbard et al.*, 18 Vt. 504.

In the charge of the county court as given, and refusal to charge as requested, there is no error.

1. The principles applicable to conditional sales and to those cases also where *part payment* has been made, and the rights and liabilities of parties under such sales, have been fully settled by this court in accordance with the decision. *West* v. *Bolton*, 4 Vt. 558. *Smith* v. *Foster*, 18 Vt. 182. *Buckmaster* v. *Smith*, 22 Vt. 203.

2. Fraud invalidates and renders void all contracts tainted therewith; and the purchaser of property, who obtains the *temporary possession* thereof, by means of *frauduleut and false representations*, acquires no valid title to or legal possession of such property; and the right to reclaim property thus fraudulently obtained, exists and remains in the original owner. *Keyes* v. *Carpenter*, 3 Vt. 209. *Hodgenden* v. *Hubbard et al.*, 18 Vt. 504. *Fitzsimmons* v. *Joslin*, 21 Vt. 129.

By the Court. 1. By the terms of the written contract, which is conclusive, as between plaintiff and James Putney, he had no right to sell the colt, at all. As between them the very act of sale by Putney, terminated the bailment and gave plaintiff the right to take immediate possession and to retain it until paid the balance of the purchase money.

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2. So too his having taken possession, under a claim of right, and this being acquiesced in by Putney, the plaintiff's possession is sufficient to enable him to maintain trespass against defendant for his retaking the animal, unless he can show a better right.

3. The defendant's right is based upon his purchase, which is so tinctured with fraud, as to be voidable at the election of the vendor, Putney, if he had a right to sell under a power from plaintiff, might himself avoid his own sale for such a fraud as was shown in this case, or plaintiff might do it, as the principal vendor, and on this ground alone the defendant's right would thus terminate.

4. The defendant claims no benefit of Putney's right of possession, for he did not profess to buy that. His claim, if maintained at all, must stand upon the power of sale, which he proved, and Putney's sale to him failed in meeting either alternative of the power. It was neither a good trade, or without being cheated.

Had the written bill of sale, contained in express terms, a power in Putney to sell the beast, although restricted to a certain price or in other respects, no doubt a sale made by him, which was valid as against him, would be also valid as against the plaintiff. But in this case the sale to the defendant was so fraudulent, as not to be binding upon Putney had he owned the property, and if not upon him, then the plaintiff, as the principal, might well assume to rescind it. Judgment affirmed.

ROBERT MCK. ORMSBY *v.* ASA LOW.

[IN CHANCERY.]

Practice.

If the orator claim an account on certain obligations set forth in his bill, which are denied in the answer, but other and different obligations admitted in the answer, sufficient to entitle the orator to an account, upon the basis of an answer; and the orator desires to have an account taken even upon the basis of the answer, in the event of failing to compel the account, which he claims, in his bill; he should obtain leave to file a supplemental bill, alledging in the alternative, the facts admitted in the answer. But if instead, the answer be traversed, and on trial, the

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orator fail to support the facts relied upon in his bill, he cannot fall back and claim an account, upon the basis of the answer.

APPEAL from the court of chancery. The above is the only point ruled in the case.

R. McK. ORMSBY *v.* LEWIS GILMAN.

Assumpsit on promissory note. Defense.

The fact that a note was purchased and put in suit for the purpose of harassing the defendant, is no defense to an action brought to recover the value of the note.

ASSUMPSIT upon a promissory note for $63, executed by Lewis Gilman, the defendant, and made payable to R. McK. Ormsby, the plaintiff, the note was transferred by the plaintiff to one Thomas Murphy, who afterwards sold it to one Alvan Taylor, who is the plaintiff in interest, in the present suit.

The defendant plead in bar, and set forth in his plea, that said Taylor was the plaintiff in interest in this suit, and that the note was purchased by the said Taylor, for the purpose of putting it in suit, and thereby harassing the defendant; that neither said Ormsby nor said Murphy would have sued said note had it remained in their hands.

To this plea there was a general demurrer.

The county court, June term, 1851, COLLAMER, J., presiding, rendered judgment that the plea in bar is insufficient in law, and rendered judgment for plaintiff. Exceptions by defendant.

R. McK. Ormsby for defendant.

The purchase of the note in suit is in defiance of our statute and the suit should not be sustained. See Comp. Stat. 494, § 12.

The plaintiff of record has no interest in this suit; if the suit be upheld, it will be for the benefit of Taylor, the plaintiff of record being his trustee.

But Taylor's interest is entitled to no protection; it is a transaction prohibited by the statute.

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Further, at common law, the suit would not be upheld, it comes within the common law definition of maintenance, or *champerty*, a species of maintenance. See 3 Black Com. 135; *Bell* v. *Smith*, 5 B. & C. 188.

The illegality of a transfer is a good defense to an action in the name of the indorsee. See 1 Starkie's Rep. p. 385. *Snow* v. *Conant*, 8 Vt. 301.

J. W. D. Parker and *S. Austin* for plaintiff.

The terms of the note gave the payee the right to transfer it, and its being transferred did not in any way lessen the defendant's liability to pay it.

It is wholly immaterial whether Ormsby or Murphy would have sued said note, had it remained in their hands; if they had a lawful right to do so, no good reason exists why Taylor might not do the same.

When a negotiable note is transferred, the vendor gives the vendee the right to bring a suit in his name for the recovery of the money. *Bank of Burlington* v. *Beach*, 1 Aik. 62. *Smith* v. *Burton*, 3 Vt. 233. *Baxter* v. *Buck*, 10 Vt. 548. *Thrall* v. *Benedict et al.*, 13 Vt. 248. *Boardman* v. *Roger*, 17 Vt. 589.

It is immaterial with what motive a person does a legal act. Taylor had a right, by law, to sue for, and collect the money due upon the note, if the putting in force of this right had the effect "to harass the defendant," as alledged in the plea, it is "*damnum absque injuria*," and brought upon the defendant by his own fault. *Humphrey* v. *Douglass*, 11 Vt. 22.

By the Court. The questions in this case arise upon a general demurrer to the defendant's plea.

The Comp. Stat. 594 Sec. 12, provides "that if any attorney or "other person, shall enter into any speculating practice, by pur- "chasing or procuring to be purchased, any note or other demand "for the purpose of putting the same in suit, when otherwise, the "owner or holder thereof, would not sue the same, he or they shall "pay a fine of sixty dollars." The demurrer in this case admits the facts stated in the plea, that this note was originally given to the plaintiff, and that it was transferred to one Murphy, and by

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him to Alvan Taylor, who purchased the note for the purpose of putting the same in suit, and that this suit is now prosecuted by him as the plaintiff in interest, when it would not have been sued, if he had not purchased it.

If this suit had been commenced in the name of Alvan Taylor, whose title to the note depended upon such a contract, so that a judgment rendered for the plaintiff, would be a recognition, on the part of the court, of a legal title to the same in him, the questions which have been raised under this statute would have been directly involved. And it may be considered doubtful whether a mere purchase of a note with intent to sue it, disconnected from any other speculating practice would come within the provision of the act, or whether even, in such case, it would constitute a defense to an action on the note, or whether the remedy of the party is not given by an action on the statute, for the fine imposed. *Castle's case*, Cro. Jac. 644, cited in the case *State* v. *Wilkinson*, 2 Vt. page 488.

These are questions we are not called upon to decide, or express any opinion, as we entertain no doubt that when the note is sued in the name of the original payee of the note, the action can well be sustained, for there is no illegal act complained of, as between the maker and payee.

It does not become necessary for the plaintiff, in maintaining his right to sue on the note, or in tracing his title to the same to prove or rely upon the contract or purchase, set forth in the plea. And the court are not called upon to sustain or sanction a transfer of a note to the plaintiff by rendering a judgment thereon, when such transfer has been obtained under such circumstances.

It is to be observed that no question has been made in this case, by plea or otherwise, but that as between these parties the note was given upon a good and valuable consideration, that it is justly and equitably due, and that the defendant is under every moral obligation to pay it to any one who as plaintiff on the record makes a legal title to the note. It should be a case, therefore, free from any doubt that will warrant a court in deciding that no recovery can be had on the note, or in discharging the maker from such an obligation.

When the collection of the note, therefore, is sought to be enforced by the plaintiff as payee, against the defendant as maker,

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his right to recover thereon, is unaffected by any facts or considerations which have been urged, arising under that statute, when they have arisen between third persons, who do not appear as parties on the face of the note, or on the record as parties to this suit.

The result is, that the plea in bar is insufficient, and the judgment of the county court is affirmed.

EPHRAIM THAYER *v.* THE VERMONT CENTRAL RAILROAD CO.

Contract.

Where the plaintiff, as a sub-contractor, under one Belknap, contracted to build a section of defendant's road, and the engineers of the company had authority to direct the removal of earth from one section to another when needed, and by the contract between the company and Belknap the contractor, he, Belknap, was bound to move earth from one section to another, but no engineer had power to bind the company, (the defendants in this case,) by any contract for grading or removing earth, and if Belknap was required by engineers so to move earth, he could obtain compensation under his contract. And the plaintiff while to work on the section thus taken of Belknap was required by an engineer of defendants to move earth from the section he was building to another, under the assurance that defendants would pay for the same, it being extra haul. And this was beneficial to defendants, and plaintiffs charged them no more than it would have cost defendants to have procured the earth elsewhere, but it did not appear that defendants ever consented to have plaintiff do it upon their credit, or that they had knowledge that plaintiff was doing it upon their credit; and the plaintiff has no general contract with defendants, their contract for all this work being with said Belknap; under these facts, *it was held*, that plaintiff could not recover of the defendants for this labor. It was also held, that there was nothing in the general duties of an engineer, that would authorize him to employ others to do the work on the road, which by express contract belonged to the contractors to do.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows:—

The item in controversy is for sixty-two days works of three men and six horses and carts, at $7,50 per day—$465,00.

The services, of the plaintiff embraced in this charge, were rendered in removing earth from section 18 to 19, and were necessa-

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ry to make grade on defendants road, their being an excess of earth on section 18, and a deficiency on section 19; that without this removal from section 18 to 19, this excess would have been wasted and the company obliged to borrow elsewhere. That S. F. Belknap was original contractor with said Railroad Company, for the grading of said road throughout many sections, including sections 18 and 19; of which contract between said Belknap and said company the plaintiff had notice.

That at the time plaintiff performed these services, he was to work under a contract, between himself and said Belknap, to grade said section 18, or a part of it, which contract is in writing, and under seal, and in part is as follows, that is to say, that part of the contract between Belknap and plaintiff, and between Belknap and defendants, necessary in determining the question at issue.

"Sec. 2. All grading shall be done and estimated by the cubic "yard, measured in excavation, and shall be comprised under the "following heads, viz.: earth, rotten ledge, and solid ledge.

* * * * * * * * * * *

"Sec. 6. The earth, gravel, and other materials, except stone, "suitable for masonry and other purposes taken from excavations "upon any section, shall be used and applied in the formation of "embankments on the same section, and when the quantity of ma- "terials taken from any excavation shall be greater than that re- "quired to make the embankments of the usual width, the surplus "shall be deposited on one, or both sides of the embankments, in "such manner as to increase their width uniformly, or in such oth- "er manner as S. F. Belknap or the engineer shall direct."

[The contract between defendants and said Belknap is precisely like this, except in the former, the words "S. F. Belknap or" do not occur; in all other respects they are alike.]

"In cases where the quantity of materials taken from the exca- "vations in any section shall not be sufficient for the formation of "the requisite embankments, the deficiency shall be supplied by "materials taken from the adjacent grounds, at such places as S. "F. Belknap or the engineer may designate, or from an enlarge- "ment of the excavations made equally and uniformly on one side "or both sides of the same, or in such other manner as S. F. Bel- "knap or the engineer may deem necessary and proper; and the

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"sides of the excavations, in all such cases, shall be dressed off to "such slope as the engineer shall require; provided that if such "contractor shall have sloped such excavations according to the "directions of the engineer, before widening the same, he shall re- "ceive for sloping the second time, such compensation as said en- "gineer may deem fair and reasonable; provided, also, that no "contractor shall be required to supply the deficiency of materials "last referred to, at an expense of haul greater than the average "haul of the section."

* * * * * * * * * * *

"Sec. 15. * * * * * Nor shall any claims be made or "allowed for extra work, unless the same shall have been done in "pursuance of written contracts or orders, signed by the engineer; "and all claims for work done under such written contracts or or- "ders, or on any other account, shall be presented for settlement, "on or about the beginning of the month following that in which "said work may have been done,—or at any other time within "three days after the engineer shall have demanded the same; "and in case of failure so to present them, the contractor shall for- "feit all such claims, and hereby is pledged not to present them "in any way afterwards."

"Sec. 8. All stone taken from excavations shall be removed to "such places, within the average haul of the section, as S. F. "Belknap or the Engineer may designate."

The plaintiff contracted with Belknap solely to do said work, and to their contract the defendants were not a party, in its inception. That while the work was in progress by the plaintiff, one Newell, who was an assistant engineer on said road, in the employ of said company, and whose business it was to overlook and make estimates of the work, told the plaintiff, if he would move said earth from section 18 to 19, he should have his pay for it,—that the company would pay him for the same; that in pursuance of that direction of Newell, the plaintiff went on and performed the work; that the plaintiff had no contract for work on section 19; that the work was actually performed by the plaintiff, and was *beneficial* to the defendants; that had not the plaintiff made this extra haul from 18 to 19, the defendants would have been under the necessity of borrowing from elsewhere to fill up the space thus filled by the plaintiff's extra haul; that neither the plaintiff or any

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other person, has received pay for this extra work; that the same was undertaken and executed by the plaintiff, on the assurance of said Newell that he should be paid therefor by the company,—that said Newell had no express authority to make such a contract. The President and other officers of the road, passed over said sections 18 and 19, while the plaintiff was performing these services, and might have known that the services were being rendered and were beneficial, and they made no objections. That if the defendants had not had this extra haul by the plaintiff, it might have cost them to supply it from some other quarter, as much as the plaintiff has charged them for the same; that no unnecessary teams, men, or labor were used by the plaintiff in the execution of said work, and that the price therefor charged, seems to be reasonable; that the same has never been estimated nor paid for to the plaintiff, by the company, or by any body else. The custom on the line of the road was, for the assistant engineers, at the end of every month, to make out their accounts of work, on the different sections under contract to Belknap, and return the same to the chief engineer, and from these accounts the chief engineer made the whole estimates; what he called the aggregate estimates of the whole road; for the amount of which he drew his draft on the Treasurer.

For the convenience of the sub-contractors and of Belknap, the chief engineer made a return of the work done for Belknap, by each sub-contractor, in detail to Belknap. The assistant engineers were employed and paid by the company. All the engineers of the company had authority to direct the removal of earth from one section to another when needed, but no engineer had power to bind the company, by any contract for grading or removing earth, and by the contract between the company and Belknap, Belknap was bound to move earth from one section to another.

The county court, January term, 1852,—Collamer, J., presiding, rendered judgment for defendants as to the said item in the report. Exceptions by plaintiff.

J. P. Kidder and *P. Perrin* for plaintiff.

1. As to item for extra haul. The report finds, that plaintiff removed the earth under the direction of an engineer in the employ of the defendants, who agreed with plaintiff that the defend-

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ants should pay him for the extra services; that the engineer had authority to give such directions which plaintiff was bound to obey; that the services were "*extra*" and *beneficial* to the defendants; that there was an excess of earth on section 18 and a deficiency on 19; that the defendants would have had to borrow elsewhere to fill the space thus filled by plaintiff's "extra haul"; that plaintiff nor any one else, had pay for the same; that the president and other officers of the company saw the plaintiff performing these services, and made no objections; that if defendants had not had this "extra haul" it might have cost them to supply it from some other quarter as much as plaintiff has charged, and that the price charged therefor is reasonable.

On these facts, the defendants are liable. *Vt. C. R. R. Co.* v. *Baxter*, 22 Vt. 365. *Vide.* Sec. 6, in contract between the parties.

2. Belknap was to have pay, and also plaintiff, for earth, by the cubic yard, measured in excavation; the haul, then, "greater than the average haul of the section" is to be paid for by the defendants, to any person who may perform the service.

Belknap would have no claim on them (defendants) for service that *he* did not perform.

The plaintiff not doing the work *for* Belknap, he must loose his pay therefor unless he can hold the company, who have received the benefits thereof, *without paying for the same.* *Vide.* Sec. 2 and 6 of contracts between parties.

Peck & Colby for defendants.

1. The fact that Newell directed the removal of the earth to section 19, and promised payment to the plaintiff, does not make the defendants liable, as the auditor has found that Newell had no authority to bind the corporation by such promise. It does not appear that the defendants ever ratified or adopted the act of the engineer, or even had any knowledge of it. The defendants are not to be charged on this ground.

2. The auditor reports "that the president and other officers of "the road passed over sections 18 and 19 while the plaintiff was "performing the services, and might have known that the services "were being rendered and were beneficial, and they made no ob-"jection."

In order to charge the defendants on this view of the case, it

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should appear that they understood, or had reason to believe, that the plaintiff looked to them for payment. No such fact is found by the auditor, and from the facts detailed, it is apparent, that they could not have acted on such a belief. Belknap had contracted to grade the whole road, and the auditor has found, that by the terms of the contract he was bound to remove earth from one section to another, when directed to do so by the engineer. There was no contract between plaintiff and defendants, and for aught that appears, the latter had no knowledge of the terms or extent of the plaintiff's contract with Belknap. When the officers of the corporation saw the plaintiff performing the labor, they would naturally have supposed that it was done by the direction of, and for Belknap, who had agreed to do *all* the work. Under these circumstances, it was the duty of the plaintiff, if he intended to look to the defendants for payment, to have apprised them of his intention. The plaintiff having, by the direction of the engineer, done no more than Belknap was bound to do, must look to him for payment. No estimate of this work was made to the plaintiff, and whether made to any one else, is not an enquiry which effects the rights of the parties in this action. An estimate must have been made and paid to Belknap.

3. We insist that by the terms of the contract between the plaintiff and Belknap, the plaintiff was bound to remove the earth on to section 19, if so directed by an engineer. The plaintiff having done no more than he was required to do by his contract, he can have no legal claim on the defendants.

4. By the stipulation numbered 15, in the contract between Belknap and the defendants, and between plaintiff and Belknap, the plaintiff, has no right to claim payment for any extra work, unless that work was done in pursuance of a *written* order or contract signed, by the engineer. If the labor in question does not fall within this contract, then it is *extra* work, for which the plaintiff cannot recover, as it was not done under any *written* order. This stipulation was inserted to protect the company from these extra claims, and it is highly important to their interests that it should be enforced.

By the Court. The item in controversy in this case, is for sixty-two days work of three men and six horses and carts, at

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$7,50 per day, $465,00. This is claimed, as extra haul of dirt from one section of defendants road, which plaintiff had contracted with S. F. Belknap to build, to another section, by direction of one Newell, an assistant engineer of the company, under the assurance that the company would pay the plaintiff for it.

It is claimed by the defendants, that it does not appear, that plaintiff was not bound to perform this work to finish his own cantract, and that he has not really, had pay for it.

But the auditor spoke of it as "extra haul," and says it was beneficial to defendants, and that the same amount of dirt must have been borrowed from elsewhere, had it not been for this extra haul, and treats the account as reasonable in amount. So that we can scarcely regard it, as the mere performance of his own contract with Belknap. If it appeared that plaintiff had charged his entire time, while employed in hauling dirt upon section 19, some deduction should undoubtedly be made, since the plaintiff would get pay for removing the dirt, by the estimate of his excavation, and so should only be allowed what it cost him to remove the dirt to section 19, more than it would, to dispose of it upon number 18, by the ordinary embankments. But nothing of this kind appears, and we must regard it all as extra haul, and it was beneficial to defendants and plaintiff has not been paid, and should be, by some one.

The question is, then, can he recover it of defendants. He had no general contract with defendants. Their contract, for all this work, was with Belknap. And the auditor expressly reports, "All the engineers of the company had authority to direct the removal of earth from one section to another, when needed, and by the contract between the company and Belknap, he was bound to move earth from one section to another, *but no engineer had power to bind the company, by any contract for grading or removing earth.*" This labor, then, so far as the company was concerned, comes within this contract with Belknap; he was bound to perform it, if required so to do by the engineer, and, of course, could obtain compensation under his contract.

But notwithstanding this, they might employ some one else to do it, or they might adopt the act of some one else, doing it.

This could not be claimed, upon the mere ground that it was beneficial to defendants. One cannot compel another to become

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his debtor, even by doing him good. And if this were merely the performance of Belknap's contract, it would really enure to *his* benefit.

There must be shown something, which amounts to a consent of the company, to have the plaintiff do it upon their credit.

The fact, that the president and other officers of the company, passed along while the work was doing, "and might have known that plaintiff was doing it, and it was beneficial, and made no objection," could amount to but little, unless knowledge was brought home to them, that plaintiff was doing it upon the *credit of the company.* They would naturally suppose he was doing it for Belknap, or that in some way, it was being done under Belknap's contract with the company, so far as they were concerned, as they had made no other contract. They would scarcely be required, to inquire into the terms of the contract, between Belknap and his workmen, or sub-contractors, and no inference could fairly be made against them, as to having made a new contract with some third person, upon that ground, as it seems to us.

And it seems to us equally obvious, that Newell, could not bind the company by any such contract. If he could, so could all the engineers, and the defendants position would be rendered somewhat perilous, and the restrictions in their written contracts would be of little avail. The auditor, it seems to us, entirely disposes of this; for he not only says, that this engineer "Newell had no express authority to make such a contract," but as has been before stated, that "*no engineer had power to bind the company, by any contract for grading, or removing earth.*" This is too explicit to be evaded, or overcome, unless we can see from the contract, or the relation of the engineers to the company, that the auditor has misconceived their power.

As between the company and their contractors, the contract seems to us to have expressly denied the power of the engineers, or the chief engineer, to bind the company for extra work, except in a particular mode, *by writing*, and then, the claim to be presented and adjusted, in a prescribed time and mode.

And there is surely nothing in the general duties of an engineer, that would authorise him to employ others to do the work on the road, which by express contract belonged to the contractor to do. If he could do this, he might have rescinded the entire contract with Belknap, and let the work to others.

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For when it is claimed to set up an independent contract, made with a third person, by a sub-engineer, to do work let to the general contractor with the company, it is impossible to limit it to $500. The principle of the thing is the same, when it is extended to $5,000.

The case of these defendants v. *Baxter*, 22 Vt., 365, cannot aid the plaintiff. That rests upon the nature of the right exercised by Belknap, and that *he* could only have exercised it, by the authority conferred by the legislature, upon the company. Judgment affirmed.

State v. Joseph Atkinson and Others.

(Decided at Woodstock Special Term Sept. 1852.)

Nuisance. Dedication to public use. Indictment. Forfeiture.

Courts will not presume any fact that works a forfeiture of an estate.

Where the fee of land is vested in a town, or in an individual, yet if the use and occupancy be in the public, as a highway or common, any obstruction thereof is a nuisance, for which, the persons making such obstruction, may be presented by indictment.

A public common in such case, may be described as a highway.

Indictment, for erecting and continuing a nuisance on a public common in Newbury.

Plea, not guilty, and trial by jury.

The attorney for the State read in evidence a copy of a quitclaim deed from William B. Bannister to Thomas Johnson, and 32 others, dated May 23, 1801, conveying the premises upon which the alledged nuisance was erected. The *habendum* of which is as follows:—

"To have and to hold the said bargained, granted and quitclaimed premises to them the said [*naming all the grantees*] their "heirs and assigns forever, under the conditions, limitations, reservations and remainders, hereinafter mentioned. Now it is "the true intent and meaning of the foregoing instrument and it

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"is made and executed for the express purpose that the above "granted and bargained premises shall be thrown open to be a "public common or green forever; never to be fenced, enclosed or "obstructed in any part or manner whatever. Saving and except- "ing to the above mentioned grantees, their heirs and assigns the "privilege and right to erect and complete a suitable house, for "the purpose of convening the General Assembly of this State, "and to be improved likewise for a county Grammar School house, "provided such school may be incorporated and established in this "town, and the said grantees shall have the right, from time to "time as may be necessary, to repair such house, and likewise to "erect, and in like manner keep in repair, such other building or "buildings as may be necessary and convenient for the purpose "aforesaid. Provided, also, and if it should happen that the said "county Grammar School shall not be incorporated and establish- "ed in this town, and if the General Assembly of this State, shall "not after its next session, in future meet and convene in this "town, so that both the purposes above contemplated, or either of "them shall fail, it is hereby further saved and reserved to the said "grantees, their heirs and assigns, that they shall have the right "to convert such building or buildings as may have been erected "for the purposes aforesaid, and to improve the same for such "other moral and useful purpose or purposes, as a majority of said "grantees, their heirs and assigns may agree, meaning by such "majority, a majority of interest, in proportion as said grantees, "their heirs and assigns may advance and pay, in so erecting and "completing such building or buildings."

"And provided, further, that on failure of both purposes, or ei- "ther of them, first mentioned in the conditional part of this "instrument, and if a majority of said grantees, their heirs and "assigns shall agree to convert such building or buildings as may "have been erected for such first mentioned purposes, and to im- "prove them for any other moral and useful purpose or purposes, "it is hereby further excepted and reserved to said grantees, their "heirs and assigns, that they shall have the right to erect and keep "in repair on said premises, such other building or buildings as "may be necessary and convenient, to facilitate and promote such "last mentioned purpose or purposes."

"And provided, further, that if any or all of said buildings shall

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"at any time in future, be destroyed or come to ruin by natural "decay, by fire or any other casualty whatever, it is hereby fur- "ther excepted and reserved to said grantees, their heirs and "assigns, that they shall have right to repair and rebuild any such "building or buildings so decayed or destroyed, at any time within "five years next after the same shall so have become unfit for oc- "cupation and improvement, and not after."

"And it is hereby further provided and conditioned, that if "both the purposes first mentioned in this conditional part of this "instrument shall fail, and if the said grantees before mentioned, "their heirs and assigns shall neglect, for the space of five years, "from and after the date of this instrument, to erect on said prem- "ises, and complete such building or buildings as is herein before "contemplated, or if for five years together, next after any such "building or buildings shall have decayed, or in any manner been "destroyed or become unfit for occupation and improvement, they "shall neglect to repair or rebuild such building or buildings, or "if the said grantees, their heirs and assigns, shall at any time for "the space of five years together, neglect to occupy or improve "such building or buildings as is herein contemplated, for some mor- "al and useful purpose and purposes, excepting, however, for the "public and ordinary meeting and transacting of business in and "for said town of Newbury, and meaning that such an improve- "ment and occupation of said building or buildings, for such last "mentioned purposes, shall not save and prevent the forfeiture "and remainder hereinafter provided."

"Now upon all and several the contingencies in this last proviso "mentioned, the remainder, meaning thereby the whole interest, "right and title in and unto the above granted and bargained "premises is hereby saved, given, granted, conveyed and confirm- "ed to the selectmen and treasurer of the town of Newbury, for "the time being, and to their heirs and successors in office; the "same to be an open or public common to, and for the purpose, use "and benefit of said town forever."

Said deed was duly recorded May 25, 1801.

It was further shown, that the respondents erected a school-house on the premises described in said deed, in the summer of 1851, in pursuance of a vote of the school district in which said premises are situate, appointing the respondents a committee for that pur-

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pose. It was further proved that in 1801, a house was erected on said premises to convene the legislature of this State, who held their session therein in 1801, but have never held a session there since.

It further appeared, that the town of Newbury held their town meetings in said building up to the year 1829, when they ceased to occupy it, and built a town house about four miles distant, where they have ever since held their meetings. It was further shown on the part of the State, that the district school was kept in a room in said building from about 1809, up to 1828 or 1829, when the building having become unfit for use, (and soon after went to decay,) a new school house was erected on said premises, on or near the north-east corner. That when this house was about to be built by the district, there was some question made by some one of the district, about the right to build said house there. That the district school was kept in this house up to the time of building the house in 1851, at which time the former school-house had become unfit for use.

It appeared that the latter house was erected on the east side of said premises, about midway, and on the site where the old State house formerly stood, and that at the meeting, when it was voted by the district to erect said house, one of the members of the district told them they should not put the house there. It was further shown, that no Grammar School was ever incorporated in said Newbury; that said premises had remained open and unin-closed since 1801, and that a highway passed along by the north side of the premises, and also on the west side. It also appeared that there was one dwelling-house on the adjacent lands west, and one north, and both across the highways from said premises, but it did not appear that said houses, or any others, were erected facing said premises, since the date of the Bannister deed. Said school-house, built by the respondents, is on the highest land on said premises, and the best place thereon for a public building.

On this showing the government rested.

The respondents then offered to prove, that at the time said State house was erected, and when the district school was first kept there, all the grantees in said Bannister deed lived in Newbury, and twenty of them in said school district. That said State house was erected in 1801, at an expense of $1250, contributed

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mainly by said grantees, and that $990 of said $1250, was contributed by the grantees living in said district. That as early as 1802, a school room was finished off and fitted up in said building, and that the district school was kept therein, as long as said building was fit for use, the said district repairing said school room from time to time; that in 1828 (said State house having become dilapidated and unfit for use,) the district erected a new school-house on the north-east corner of said premises, where the district school has been kept until the erection of the new house in 1851, in which the school is now kept, the old one having become unfit for use.

The respondents further offered to prove, that the said grantees and their heirs residing in said district, have always sent their scholars to said school, and that there never has been any interference, interruption or objection to said schools being so kept, or to the erecting of said houses, either by said grantees, or said town, or by any other person or persons, except as before stated.

The respondents further offered to prove, that the school-house last erected, is a good and commodious one,—was erected on the extreme east side of said premises, on the site where the old State house stood, and in a manner not likely to incommode the ordinary use of said premises as a common, and leaving sufficient room for the erections contemplated in the provisions of said deed, and that the town had never occupied said premises for any purpose, since the decay of the old State house in 1829, or thereabouts.

This evidence was objected to and excluded, to which the respondents excepted; the jury returned a verdict of guilty.

A. Underwood for the respondents.

The evidence offered and excluded, is to be taken as true for the purposes of this hearing.

The respondents and the school district are occupying the school-house agreeably to the *express* provisions of the Bannister deed. That from the long time they have so occupied, a license is to be *presumed* from the grantees.

It is expressly provided, that in case of a failure of the legislature to convene there, and in case no Grammar School shall be incorporated and established there, that a majority of the grantees may improve the buildings erected, or erect others, for any other

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moral or useful purpose, and nothing short of a *non user* for five consecutive years, works a forfeiture to the town.

It cannot be pretended that a common school is not a *moral* and *useful purpose* within the meaning of the deed. *Carleton* v. *Langdon*, 19 Vt. 210.

It cannot be denied that the grantees could have erected a school-house on the premises, and if they could, any other person can do so, by their consent.

If the respondents are liable, the district or their officers were liable for keeping a school in the old State house, and for erecting the first school-house.

The district have claimed and enjoyed the right of having a school on the premises for fifty years, from which a grant is to be presumed.

If the grantees could erect a school-house on the premises, they could license the district to do so, for it is the use, that is provided for, and not the persons who may use.

The respondents insist that there never has been such a dedication to the public use, as is necessary to support an indictment.

To constitute such dedication, there must be not only a manifest intention, on the part of the owner, to dedicate the land to public use, but the public, *relying on that intention*, must actually enter into the use and occupancy, in such manner as to render it unjust to reclaim it. *State* v. *Trask*, 6 Vt. 355.

In the present case, the public never have used the common.

The only use the town ever made of it was to hold town meetings in the State house to 1828, since which, they have totally abandoned it. *State* v. *Wilkinson*, 2 Vt. 480. *Abbott* v. *Mills*, 3 Vt. 521. *State* v. *Catlin*, 3 Vt. 530. *Pomeroy* v. *Mills*, 3 Vt. 279. *Foundling Hospital*, 11 East. 375.

The school district have had the exclusive use of the premises for twenty-three years.

It is insisted that it makes no difference that the first school-house was erected in a place different from the last, since the district have been the sole occupiers for twenty-three years.

The deed in no event, makes the premises such public property, that an indictment will lay. The property in no case vests in the public generally, but in a certain event it vests in the town.

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A. M. Dickey and *Peck & Colby* for the State.

The grantees of Bannister hold the premises in trust, for the use of the public. It is expressly stipulated in the deed, that the premises should forever remain an open common, subject to the right of the grantees to erect buildings thereon for certain purposes.

The old State house had not been used for any purpose, for more than twenty years, and the right to erect buildings thereon, for any purpose, has long since expired, unless perhaps the town may have such right, for town purposes.

Independent of the deed, the respondents are responsible for their acts. The premises have so long been open as a common, that a dedication to the public may be presumed. *State* v. *Catlin*, 3 Vt. 530. *Cincinnati* v. *White*, 6 Peters 431.

The assent of the trustees is not to be presumed from their silence. Nothing short of their express assent would avail the respondents, and after this lapse of time, we insist that their assent would not avail them. The right of the trustees to assent, had expired.

If the district, by lapse of time, had acquired a right to have a school-house where the first was erected, it does not give them a right to erect one on another part of the premises. They had no title, and can hold no more than they actually occupied for fifteen years. *State* v. *Trask*, 6 Vt. 355.

If the public had acquired an interest in the common, it is quite evident that the evidence offered was properly rejected. It could not legally affect the rights of the parties.

The opinion of the court was delivered by

Isham, J. The questions in this case arise upon the construction of the deed from Bannister to Thomas Johnson and others, and involves the inquiry, in whom is vested the title to the premises therein described, and whether the erection of the school house by the district was an appropriation of the use of the land consistent with its provisions. The object of the conveyance is definitely set forth in the deed, and whether the title of the land remains in the grantees, or has passed under its provisions to the town of Newbury, they are alike chargeable with the trust therein expressed, and neither can permit its appropriation for any other purpose or object.

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In the construction of this instrument, its several provisions are to be taken together. The whole context is to be considered for the purpose of ascertaining and carrying into effect the intention of the parties as expressed therein. We apprehend no serious difficulty can arise in ascertaining that intention, or the interest and estate which the grantees took under this deed. In the first place, it is evident that the grantees took an estate in fee, for the conveyance is *to them, their heirs, and assigns forever*. In the second place, it was a conditional grant, as the deed expressly provides, that if the objects mentioned are not carried into effect within a given time, or if they neglect to occupy or improve them according to its provisions for the same period, they shall be divested of their interest in the premises, and the title shall pass into, and vest in the town of Newbury. And in the third place, the conveyance created a trust interest, as the grantees took no exclusive beneficial interest under the deed, but its entire benefit and use, was given and inured to the public, and was so to remain forever. In relation, also, to the object of the conveyance, and the persons by whom the trust interest was to be carried into effect, the intention of the grantor is equally obvious. The premises are forever to remain a public common, whether in the hands of the grantees, or the town of Newbury, and are not to be enclosed or obstructed in any manner, except for the purpose of erecting a suitable house for convening the general assembly of this state, and to be improved likewise for a county grammar school, if such should be incorporated in that town; and in case the buildings to be erected are not used for those purposes, they are to be appropriated for *some moral and useful purpose*, to be designated by the grantees in the deed, having a majority in interest.

The exercise of this right or power, in determining what is that moral and useful purpose, to which the use of the premises may be appropriated, is manifestly confined to the grantees, so long as the legal interest in the premises remains in them; but will pass to those, to whom they may have conveyed, or to their heirs, in case of the death of any of them. Wherever the title passes, there is vested the right of the trustees to see that the object of the conveyance is carried into effect, and to determine upon the useful and moral purposes, to which the premises may be applied. This construction, is necessary to preserve the estate, as an estate in fee;

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otherwise, upon the death of the grantees, the property would pass to the town, as there would be no persons in being to execute the continued trust. The express provisions of the deed would be thereby defeated, for the conveyance was *to them, their heirs and assigns forever*; and their decision or action upon the subject, when made by a majority in interest is conclusive, and no one has a right to interfere, or call the matter in question, provided it is a moral and useful purpose to which the premises are applied. The town, or the public, have no title to the premises, so long as the grantees, their heirs, and assigns have not neglected for the period of five years, to exercise their powers and duties under the deed. Under this construction of the deed the case is resolved into the inquiry, whether the grantees, their heirs, or assigns have lost, or forfeited their rights under this deed; and whether the title has passed from them to the town of Newbury, by any neglect to comply with the conditions and provisions of the deed. In disposing of this question, it becomes necessary to refer to the testimony and the facts, as stated in the exceptions.

The deed was executed May 3, 1801. The house for the use of the legislature was immediately erected, and its annual session was held therein for that year, but has never convened there for that purpose, since. A county grammar school has never been established or incorporated within the town of Newbury. Those two objects and purposes for which the conveyance was made, are therefore removed. Yet by the erection of that house for that purpose, there was such an acceptance of the grant and trust on the part of the grantees, as made the conveyance perpetual and binding.

As those objects of the conveyance failed, the duty devolved upon the grantees to occupy and improve the building so erected for some moral and useful purpose. And in the discharge of this duty, in order to keep their title perfect under their deed, it was not sufficient that the grantees remained inactive, while others entered upon the premises without license, and used the premises, though for purposes strictly moral and useful. For such possession would be adverse to that of the grantees, and a perfect title to the premises might be acquired by lapse of time against them, by such possession. 1 Saund. 280.

But there must be some positive act on the part of the grantees,

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as a contract or license, authorising all those in possession of the premises, thus to occupy them under the deed. In other words, there must be a possession and occupancy of the premises by the grantees or those under them, for the purpose of carrying into effect the various objects referred to in the deed, and to such full and absolute extent, as to forbid the use and occupation of any part of the same by others having *no right or authority under them*. The occupation of the building by the town of Newbury for town meetings can have no effect, to save from forfeiture the rights of the grantees under this deed, as it contains an express provision to that effect. Neither will it have any effect in establishing the title of the town, for such use was contemplated by the parties, as being consistent with the right of the grantees under the deed.

In relation to the occupation of the premises or building which had been erected by the grantees, it was proved, that from about 1809 to 1829, a district school was kept in a room in the building erected for a state house. And the respondents offered to prove that the room was so fitted up as early as 1802, and at the expiration of that period the house had become dilapidated and unfit for use. It does not appear very definitely by what means, or under what circumstances the school was commenced and continued in that building, from 1802 to 1829. Whether it arose from the act of the school district alone, in taking possession of the otherwise unoccupied building, and the grantees under the deed neglecting to interfere with such interruption, or whether the school was established by the grantees, as one of the moral and useful purposes to which they had a right to appropriate its use and occupancy.

But from the circumstance that the school was established therein so soon after its erection, and the fact that the building was erected and built by the grantees at their expense, it is not unreasonable to presume that the school was established, and the building used and occupied therefor, by the license and authority of the grantees in the deed. The court will not presume any fact, that works a forfeiture of an estate. Such facts must be matter of strict proof, and a seizure and possession once having been proved in the grantees under their deed, such seizure is presumed to continue until a disseizin is proved. *Brown* v. *King*, 5 Met. R. 173. We think, therefore, that the title and right of possession of these premises continued in the grantees of this deed, during the period

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that the building erected by them was so used and occupied. In 1829, the building erected for a state house became unfit for use and went to ruin. It was never repaired or rebuilt by the grantees. But a new school house was erected, as the case states, by the school district in a different place on the premises, and that building was used and occupied by the district from 1829 to 1851. The case is destitute of any facts showing the assent of the grantees under the deed, to this erection and possession of that portion of the land by the district, and also, of any circumstances from which such assent can be presumed, for it is affirmatively found, that it was erected for the school district, and this impliedly negatives any other right. The assent of the grantees, is not to be found, or inferred, from their making no objections to such erection and use, at that, or any subsequent time, or from their neglect to maintain their rights under their deed, against this entry and occupancy; for such assent can be given only, by some positive act of the grantees, or those holding under them, having a majority in interest. And, from the further consideration, that it is by such neglect that a forfeiture of the estate arises, and vests the title, under the deed, in the town of Newbury. Neither can such assent be drawn from the fact, that a majority in interest of the grantees, lived in the district, and sent their children to that school, for the obvious reason, that such acts of the grantees, are such as would likewise naturally occur, if there had been an open renunciation of their right to the premises, and are consistent with an entire abandonment of their claims under the deed. The evidence, therefore, offered by the respondents, in proof of those facts, was properly rejected. To make the erection of that building, and the use of the premises, an act of the grantees, or those holding under them, and done in the exercise of their right under the deed, it should appear, that some distinct and positive act was done by a majority in interest of the grantees, giving such license to the district, and it should be an act of that character, totally inconsistent with the idea of a relinquishment or abandonment of their claim, or right under the deed. The case is totally destitute of any such circumstance or consideration, and we can arrive at no other conclusion, from the facts in the case, than that, that act on the part of the district, was done in disregard of the rights of the grantees under the deed, and, to the extent of their occupation of the premises,

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was a disseizin in fact. And the neglect of the grantees, or those claiming under them, for five years thereafter to sustain their rights to that portion of the premises, and to rebuild and repair the buildings that were erected by them, and to use and occupy the same for such moral and useful purposes, as were contemplated in the deed, worked a forfeiture of their estate and interest in the premises, and vested the same in the town of Newbury, to hold under that deed, for an open and public common forever. The erection of that building by the district, in 1851, in a different place on the premises, was, therefore, wrongfully made, and was in violation of the rights of the town of Newbury and the public, under that deed. And though the fee of the premises may be vested in the town, or be private property even, yet if the use and occupancy be given to the public, as a highway, public square, or common, and it has been for a long time used for passing and repassing, and has been common to all the people, any obstruction thereof, or nuisance erected thereon, may be prosecuted by indictment. Such is the doctrine in the case of *State* v. *Wilkinson*, 2 Vt. 480, and in *Shaw* v. *Crawford*, 10 John. R. 237, and the premises may be described in an indictment as a public highway. 2 Chitty C. L. 389.

The result is, that the respondents take nothing by their motion.

SETH E. PECKER v. JOHN H. SAWYER.

Promissory Note. When indorser may testify. Payment.

The indorser of a promissory note is a competent witness to prove the note void in its inception, when he is not shown to be directly interested in the event of the suit.

Where there was an agreement between the parties to a promissory note at the time it was executed, that a book account, in favor of the maker and against the payee, should be applied in payment of the note upon settlement, and the amount due on book exceeded the amount due on the note at the time the note was indorsed, the fact being proved is a sufficient defense to a suit brought by an indorsee to recover the value of the note of the maker, when the note was indorsed over due.

The case *Nichols* v. *Holgate*, 2 Aiken 138, considered and confirmed.

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Pecker v. Sawyer.

ASSUMPSIT upon a promissory note for seventy dollars, dated at Concord, N. H., January 20, 1848, executed by the defendant and made payable to D. G. Fuller, agent, or order, on demand. Said note was indorsed by said Fuller to the plaintiff. Plea *non assumpsit* and notice of special matter, and trial by the court, January term, 1851.

On trial, the execution and indorsement of the note were conceded, and the defendant offered the deposition of D. G. Fuller, the original payee of the note, to show that the note was given at Concord, N. H., in payment for spirituous liquors sold to the defendant in 1848, contrary to the statute of New Hampshire; said Fuller having no license therefor. Said deposition also showed that at the time the note was given, there was a book account existing against said Fuller in said Sawyer's favor, and that said note was given with the understanding and expectation that whatever was found to be due said Sawyer from said Fuller, upon said account on settlement, should be deducted from the amount of said note; that the amount of said account when ascertained was found to be nearly sufficient to balance said note, and that said account, together with certain sums paid said Fuller by said Sawyer before the transfer of the note, were more than sufficient to balance said note. The plaintiff objected to the admission of said deposition, on the ground that said Fuller, being an indorser of the note, was not a competent witness, or admissible in law, to testify to said note being bad in its inception or unavailable when indorsed by him.

The court admitted the deposition, and no other testimony was given.

The court held that said Fuller was not a competent witness to prove the note void in its inception, and rejected that part of his deposition which tended to show it so, and that his testimony was insufficient evidence of the statute of New Hampshire therein named. The court found as true, the other facts stated in the deposition, and rendered judgment for the plaintiff to recover eighty-five dollars and forty-eight cents damages, and his costs. Exceptions by defendants.

R. McK. Ormsby for defendant.

The court erred in deciding that the payee of the note, after its

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indorsement by him, could not be a witness to show the note void in its inception. The early English case of *Walton* v. *Shelby*, was followed in this country, in early times, by several of the states; but English courts retracted from that doctrine, and New York has abandoned it. Connecticut and Vermont never adopted that rule. Massachusetts commenced under the Shelby rule, and still adheres to it. Sec. 2, Starkin on Ev. (5 Am. Ed.) 256 and 257 and *Notes*. *McFadder* v. *Maxwell*, 17 Johns. R. 188. *Nichols* v. *Holgate*, 2 Aik. 138. *Chandler* v. *Mason*, 2 Vt. 198.

The note was overdue, and the indorsee took it subject to all equities. *Britton* v. *Bishop*, 11 Vt. 70. *Walbridge* v. *Kibbee*, 20 Vt. 543.

The negotiation of the note under the circumstances, was a fraud upon the maker. This being shown, it was incumbent on the indorsee to show that he held it *bona fide*, and for a valuable consideration. *Vathier* v. *Zary*, Gratton's Virg. Rep. 246, (Law Mag. Vol. 3, No. 1, p. 75). *Heath* v. *Lawson & Evans*, 22 E. C. L. 78. 12 *id.* 285. Ch. on Bills 648, *id.* 69.

C. B. Leslie for plaintiff.

The plaintiff contends that, that part of David G. Fuller's deposition which was rejected by the county court, was properly rejected, for two reasons.

1. Because said Fuller, being the indorser of the note in suit, is not a competent witness for defendant to prove that said note was void in its inception. *Chandler* v. *Mason*, 2 Vt. 193. *Bank of U. S.* v. *Dunn*, 6 Peters R. 51. *Bank of the Metropolis* v. *Jones*, 8 *id.* 12. *U. States* v. *Leffler*, 11 *id.* 86. Greenleaf on Ev. Sec. 385 and Note 1.

2. Because it was also offered for the purpose of proving the statute law of New Hampshire, which can not be done by parol, and, therefore, was insufficient for that purpose. 1, Greenleaf on Ev. Sec. 489, *Woodbridge* v. *Austin*. 2, Tyler's Rep. 364, *Territt* v. *Woodruff*, 19 Vt. 182.

That part of said Fuller's deposition which was admitted by the county court, was offered for the purpose of proving a payment of the note in suit. The county court found the facts therein stated, to be true, but also found that the facts did not prove a payment. The decision of the county court upon this point is conclusive, and

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will not be reviewed by this court. *Noble* v. *the Administrator of Jewell*, 2 D. Chap. Rep. 36. *Strong* v. *Barns*, 11 Vt. 221. But if the court are of opinion that this is a question of law, and will examine this part of the case, then I contend that the facts stated in that part of said deposition which was admitted and found to be true, by the county court, do not prove a payment of said note or any defense thereto. If they prove *anything*, it is, that at some time there were unsettled claims existing in favor of defendant Sawyer, against said Fuller, which, if the suit upon this note had been brought in the name of Fuller, might have been the subject of an offset.

By the Court. The principal question in this case, arises upon the rejection of a portion of the deposition of David G. Fuller, the payee and indorser of the note. His testimony was offered by the defendant, to show the note void in its inception, as having been given on the sale of spirituous liquors in the state of New Hampshire, by this witness, and without any license therefor, such sale being unlawful under the laws of that state. This testimony was rejected by the court, as being incompetent to prove the note originally void.

It is not pretended that the witness has any interest in the event of this suit, or that he is otherwise incompetent, except from having indorsed, and thereby having become a party to the note. And upon the authority of *Walton* v. *Shelby*, 1 T. Rep. 269, and various other cases adopting the principle of that case, it is urged that his testimony for that purpose, should not be received, "on "the ground that no man shall be permitted to invalidate an in- "strument, by his testimony, to which he had set his hand." A different principle was afterwards adopted in England, by the cases of *Bent* v. *Baker*, 3 T. Rep. 27, and *Jordaine* v. *Lashbrook*, 7 T. Rep 601, in which it was held that witnesses so situated, were competent to testify in the case, though their relation to the note was a proper subject for consideration, as affecting their credibility. The principle of these cases respectively, has been too much the subject of investigation in the English courts, as well as this country, to render it necessary, or of practical importance, to enter into an investigation of the subject, any farther than to ascertain and state the general result of the authorities on this question.

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In England the question has been considered as settled by the case of *Jordaine* v. *Lashbrook*, and since that decision the rule has been uniform, "that the party to any instrument, whether nego-"tiable or not, is a competent witness to prove any fact to which "any other witness would be competent to testify, provided he is "not shown to be legally infamous, and is not directly interested in "the event of the suit," and this rule is of general application, except it be in the case of public officers, who are not permitted to falsify statements and certificates, given in their official capacity. 1 Phil. Evid. 42, and note 78. 1 Greenleaf Evid. § 384. In 2 Smith's notes to leading cases 50, margin, it is said, "that the "courts ever since the case of *Bent* v. *Baker*, have evinced a "laudable desire to let in truth wherever precedent will admit it, "by holding objections to apply rather to the credit than the com-"petency of the witnesses." This rule, so uniformly adopted in England, was, upon mature consideration, adopted in this state, in the case of *Nichols* v. *Holgate*, 2 Aik. Rep. 138. The authority of that case, was afterwards indirectly questioned in the case of *Chandler* v. *Mason*, 2 Vt. 198. But we are unanimously of the opinion, upon this investigation of the subject, that the case of *Nichols* v. *Holgate*, was well considered and correctly decided, and that the principle of that case should not be departed from. For it was properly observed in that case, "that more evil is experi-"enced from shutting out testimony entitled to credit, than would "be prevented by seeking for new causes for its exclusion." This rule has now become the settled law in New York. 8 Cow. Rep. 673. 3 Wend. Rep. 416. In Conn., 1 Con. Rep. 260, 13 Con. Rep. 360. In N. Jersey, 2 Haz. 192. 2 Pen. Rep. 791. In 10 N. H. Rep. 180. Also in Maryland, Virginia, S. Carolina, Georgia, Tennessee, and some other states.

The doctrine of *Walton* v. *Shelby*, is, however, followed by the supreme court of the U. States, and by the courts of Massachusetts, Maine, Pennsylvania, and Ohio. The practical effect of that doctrine, has, however, led to that modification of the principle that it is now regarded as a mere rule of commercial law, intended for the security of trade, and restricted to negotiable instruments. 11 Peters Rep. 95. 9 Met. Rep. 471. 4 W. & Sergt. 128. 3 How. Rep. 73. In all other cases, and in other instruments, the rule as settled in *Jordaine* v. *Lashbrook*, has its application.

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And in the case of mercantile paper, the courts adopting the rule of *Walton* v. *Shelby*, have limited its application, by requiring that the instrument be actually negotiated, and under circumstances freeing it from antecedent equities. When, therefore, a note is endorsed after it reaches maturity, the endorser, payee, or maker, is a competent witness, on the ground of policy, and can not be shut out, except on the ground of interest. 11 Pick. Rep. 417. 2 Met. Rep. 289. 18 Ohio 579. 4 S. & Rawle 399. 2 Smith's Lead. Cas. 127.

In the application of these principles to this case, it will at once be perceived, that the part of this deposition which was rejected, ought to have been received and read to the jury. It was clearly admissible upon the authority of the case of *Nichols* v. *Holgate*, and as this note was transferred nearly two years overdue, the testimony could not be excluded upon those authorities, adopting the principle held in *Walton* v. *Shelby*.

The court admitted the witness to testify to the payment of the note, and from which we learn, that when the note was given, an account existed in favor of the defendant against the payee, and that it was then understood that the amount was to be deducted from the note. This, with the sums paid on the note before it was transferred, was, as the witness testifies, more than sufficient to balance it. These facts being found, it becomes a question of law whether they constitute a legal defense. The court decided that this did not constitute a payment or defense, and rendered judgment for the plaintiff for the amount of the note. In this, also, we think there was error. In the case of *Walbridge* v. *Kibbee*, 20 Vt. 543, in a case very similar to the present, it was held, that the note was subject to any defense which grew out of the note transaction, or out of any agreement between the maker and the payee in relation to it before its transfer. In that case there was an agreement to apply the balance on book account, in payment of the note, and as the plaintiff purchased the note after it fell due, the agreement was held a good defense. The case seems to be decisive of the present action, and on both grounds we think the judgment of the county court must be reversed.

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Connecticut and Passumpsic Rivers Rail Road Company v. Azro Bailey.

[Decided at the Woodstock Special September Term.]

Motion to dismiss. Assessments on stock. Parol agreement. Discretion. Forfeiture of charter. Alteration of charter. Mutuality of contract.

A motion to dismiss a suit must be for causes apparent on the face of the written proceedings, and that which requires proof *aliunde* can only be taken advantage of by plea, and issue joined thereon.

A promise to pay assessments on stock contained in the book of subscriptions, and signed by the defendant, will bind him, notwithstanding the charter provides for a sale of the stock only, in case of a failure to pay assessments thereon.

Parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible, inoperative and void.

Each subscription is an independent undertaking, and in no way affected by the terms of other subscriptions.

That which is properly submitted to be decided by the discretion of a man, or board of men, when so decided, cannot be revised by another tribunal.

That which would operate to forfeit a charter granted by the legislature, cannot be taken advantage of by a stockholder of the corporation, in an action brought against him for the recovery of assessments on his stock. The State alone can claim such forfeiture.

Where the commissioners, appointed to receive subscriptions to the stock of a railroad, are empowered to reject such subscriptions before the organization of the company, and do not do so; *held*, that the contract entered into by subscribing for stock, is sufficiently mutual to make it valid.

This was an action of

Assumpsit, for the recovery of assessments on two shares of the capital stock of said company, subscribed by the defendant. Plea, *non-assumpsit* and trial by jury.

On the trial, the plaintiff read in evidence, the act of incorporation passed in 1835, and also acts of 1843 and 1845, modifying said act, as set forth in the declaration; and proved that the commissioners named in said acts, duly opened books for subscriptions to the capital stock of said company, the terms and conditions of which were as follows:

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"CONNECTICUT AND PASSUMPSIC RIVERS RAIL ROAD COMPANY."

"Whereas, an act of the legislature of the State of Vermont, of the 10th day of November, 1835, and another of Oct. 31, 1843, were passed, incorporating the Connecticut and Passumpsic Rivers Rail Road Company, and appointing Gardner C. Hall, Calvin Townsley, Henry Smith, Peyton R. Chandler, Allen Wardner, Timothy Shedd, and Erastus Fairbanks, commissioners to open the books and receive subscriptions to the capital stock of said company. Now we the subscribers hereby associate in said enterprise, and do hereby agree with said corporation, to take the number of shares respectively placed against our names, on the following terms and conditions."

"No subscriber shall be held by his subscription to pay assessments amounting in all to more than one hundred dollars on each share, or so much thereof as shall be assessed, the subscribers are held to pay, and said company may enforce their claim thereto, with expenses of collection, by sale of the shares, and by suit, or by either of said means."

"All subscriptions hereto, shall, until said company shall be organized, be subject to the acceptance or rejection of the majority of said commissioners."

"The condition of the following subscriptions is, that all assessments shall be for the construction, and preliminaries for the construction of that portion of the road lying between Derby line and the mouth of White River.

AZRO BAILEY, ... Two shares.
And others."

On trial, the plaintiffs proved, that before Jan. 15, 1846, at which time said company was organized, there was over $500,000 subscribed to said stock, on said books, that thereupon, said commissioners gave notice for a meeting of the subscribers to the capital stock, to organize said company agreeably to said acts, and that said meeting was held Jan. 15, 1846, and said company organized by the election of officers, and that the commissioners delivered to the officers of the company, a certificate of the organization of said company, and the subscription books of said company.

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The plaintiffs also read in evidence, a certificate of the Secretary of State, showing that said commissioners had certified to him, that notices of the opening of the subscription books, had been duly published, that subscriptions of more than $500,000, to the capital stock of said company, had been made, and that said company had been duly organized, and also showed, that the treasurer had given bonds, agreeably to the requirements of said acts, which had been accepted.

The plaintiffs also showed, that after the organization of said company, the directors had made assessments on said shares, from time to time, amounting in all to $100 on each share, of which due notice had been given to the subscribers, all of which became due before the commencement of this suit, and that the plaintiffs completed and put in operation, about forty miles of their road, from the mouth of White River, north to Wells River, by Dec. 1, 1848, no part of which was denied or controverted by the defendant.

The plaintiffs also gave evidence tending to prove, that the defendant first subscribed for one share of said stock, and afterwards that it was altered to two, by his consent, between the 4th and 8th of Sept. 1845, and before the organization of said company. It was conceded, that the defendant had never paid the assessments on said shares.

The defendant offered no testimony, but from the cross-examination of the plaintiffs' witnesses, it appeared, that the witness who testified that more than $500,000 had been subscribed to the capital stock of said company, did not personally know that all the signatures thereto, were genuine, and that one of the agents employed to procure said subscriptions, agreed with some of the subscribers thereto, that if they, after paying one assessment of five dollars on each share, requested him to take their shares, he would do so, and that in some instances it had been so done, as to persons whose names preceded the defendant's on the subscription book, and in some instances, some of the shares, after being so taken and installments paid thereon, had been surrendered to the officers of the company, and company bonds delivered thereon, and that such agreement was made, and such course was taken with one person, who subscribed for stock, at the same time the defendant did.

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No testimony was given tending to prove, that $20,000, or any sum had been expended in the construction, or preliminaries of construction of said road, by Oct. 31, 1846.

The defendant requested the court to charge the jury,

1. That if the jury found that the defendant only consented that his subscription might be changed, on the condition and expectation that he should not have his liabilities increased, and that it was changed on such an understanding, then the change would render the subscription void.

2. That it was necessary for the plaintiffs to show that twenty thousand dollars had been expended in the construction, or preliminaries of construction of said road, by Oct. 31, 1846, or they could not recover in this suit.

3. That it was necessary to prove, that $500,000 had been subscribed to the capital stock, previous to the organization of said company, and that the subscriptions were *bona fide* or they could not recover in this action.

4. That if the jury find that fictitious subscriptions had been obtained previous to the defendant's, and the defendant had thereby been induced to sign for shares, it would be a fraud upon him, and he would be released from all obligation to pay his subscription.

5. That by the terms of the subscription, there was no mutuality of obligation, and the defendant not thereby bound.

6. That the subscription, by its terms, does not amount to a promise to pay the assessments, which would support an action of assumpsit.

7. The defendant insisted to the court, that the declaration was founded on the acts of 1835, 1843 and 1845, while the proof showed that the defendant subscribed to the company formed by the first two named acts, that the proof showed that the subscription was not to the company, constituted by the acts declared on; and that the act of 1845, being subsequent to the defendant's subscription, and making a fundamental change in the company, of which the defendant had become a member, and being made without the defendants assent, it discharged him from liability on his subscription.

The court declined to charge the jury as requested, but did charge them, that all private unwritten agreements, made by and with any of the subscribers to the plaintiffs' capital stock, inconsist-

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ent with the written terms of their subscription, if made at or before signing, either with those who preceded the signature of the defendant, or with the defendant himself, were inadmissible, inoperative, a fraud on other subscribers, and utterly void; and if the jury found from the evidence, that the defendant signed said subscription, and that he directed two shares to be annexed to his name, they would find a verdict for the plaintiffs, otherwise for the defendant.

The jury returned a verdict for the plaintiffs, and after verdict and before judgment, the defendant filed a motion in arrest of judgment, for the insufficiency of the declaration, which was overruled by the court.

In this case the name of the clerk, which appeared on the writ and recognizance, was written on slips of paper, and attached to the writ and recognizance by wafers.

And there was a motion to dismiss the action at a former term, which motion was overruled by the court, and which sufficiently appears in the opinion of the court.

To all which the defendant excepts.

R. McK. Ormsby for the defendant.

The motion to dismiss was improperly overruled. The statute says, that if a writ shall issue without recognizance, it shall on motion abate, and there was no objection to trying this on motion. The clerk cannot delegate his authority to attorneys to take the recognizances. The principles on which this objection rests, have been recognized by this court, in repeated instances.

The plaintiffs should have shown that $20,000 had been expended by Oct. 31, 1846, as by the act required.

The plaintiffs should have shown that *bona fide* subscriptions to the amount of $500,000, had been subscribed previous to the organization of the company. *Central Turnpike Co.* v. *Valentine*, 10 Pick. 142. *Salem Mill Dam Co.* v. *Ropes*, 6 Pick. 182.

The court erred in refusing to charge as the defendant, by his fourth request, desired. If such fraudulent agreement was made by the plaintiffs' agent, it was not a fraud upon the plaintiffs.

There was no mutuality of obligation in the terms of the subscription. Agreements, to be obligatory, must be equally binding on both parties. It would be absurd to say that this subscription

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was binding upon the defendant, while the plaintiffs were at liberty wholly to reject it.

The subscription did not amount to an express promise to pay the assessments. There was a special provision in the charter for selling the shares of delinquents; this remedy should have been resorted to in this case. *Andover and Medford Turnpike Co.* v. *Gould*, 6 Mass. 43.

The most important question in the case arises from the act of 1845, dividing the company in the middle, and instead of requiring two millions of stock to organize, enabling the new company to organize with a subscription of $500,000. The defendant subscribed Sept. 4, 1845. The act, creating the present plaintiffs, was passed Nov. 1845, and no assent of the defendant to the proceeding, has ever been shown; "*non hoc fidere veni*," more than all, the declaration sets forth the plaintiffs' existence, and founded his action on the acts of 1835, 1843 and 1845, while the proof showed the defendant's subscription to a company formed by the two first named acts. *Middlesex Turnpike Co.* v. *Lock*, 8 Mass. 270. *Middlesex Turnpike Co.* v. *Town*, 1 N. H. 44. Opinion of Chancellor Bennett in *Stevens* v. *Rutland and Burlington R. R. Co.*

L. Underwood and *J. W. D. Parker* for the plaintiffs.

The court decided correctly, in overruling the motion to dismiss, nothing appears on the writ, which would warrant its dismissal; the long practice of issuing writs in this manner without objection, has created an authority in its favor.

The court were correct in their charge, that all private and unwritten agreements made with subscribers, inconsistent with the written terms of the subscription, were void. *Blodgett* v. *Merrill*, 20 Vt. 509.

The fact, that it was not proved that $20,000 was expended prior to Oct. 31, 1846, cannot avail the defendant. This was a condition *subsequent*, and need not be alledged, and if alledged need not be proved. If this defendant can defend on this ground, all the other stockholders might do the same, and their refusal, be the very reason why it was not done. *Waterford &c. R. R. Co.* v. *Dalbiac*, 4 Law & Eq. Rep. 455.

The terms of the subscription amount to a promise to pay as-

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sessments, and an action of assumpsit will be sustained to enforce their payment. *Hartford and N. Haven R. R. Co.* v. *Kennedy*, 7 Conn. (2d series) 499. *Hartford and N. Haven R. R. Co.* v. *Boorman et al.*, ibid. 530. *Worcester Turnpike Co.* v. *Willard*, 2 Mass. 80. *Taunton &c. Turnpike Co.* v. *Whiting*, 10 Mass. 327. Angell & Ames on Corporations 492, 3, 4, 5, 6, 7 and 8.

The only real question in the case, is whether by the act of 1845, passed subsequent to the defendant's subscription, he was absolved from the payment of his assessments.

It is insisted, that by the terms of the subscription he has substantially consented to it. It is an express condition to the subscription that assessments shall be for *construction* and *preliminaries*, for that portion of the road between the mouth of White River and Derby line, and his assent may as well be inferred from his acts before, as after the act of 1845, and inasmuch as the defendant gave no evidence of his dissent, his assent should be inferred.

Taking the terms of subscription, the charter and act of 1845 together, it is manifest that the legislature passed that act, in accordance with the wishes and at the request of the subscribers, and that this objection is an afterthought.

It cannot be supposed that the subscribers took stock with reference to having a charter extending south of White River, when they expressly provide for the expenditure of their subscriptions on a road north of that point, had the company attempted to construct a road with these subscriptions south of that point, they would have been restricted by injunction, as being in violation of the terms of subscription. *Stevens* v. *Rutland & Burlington R. R. Co.*, by Chancellor Bennett and cases there cited. *Stevens* v. *South Devon R. R.*, 2nd L. and Equity 138. *Hunt* v. *Shrewsbury and Chester R. R. Co.*, 3 ibid. 144. U. S. Law Magazine, Jan. No. 1852, 30, 1 and 2.

We insist that the defendant is estopped from setting up this defense; from the terms of the subscription, and from the fact that he offers no evidence of his dissent, to the change created by the act of 1845, and from the fact that he permitted the company to go on and make the expenditure without objection, it would be manifest injustice now to permit him to set up that defense, and it would operate as a base fraud upon the company. *Graham* v. *Birkenhead R. R. Co.*, 6 Law and Equity Rep. 132.

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The opinion of the court was delivered by

Isham, J. Several questions are presented in this case, arising first on the motion to dismiss, and secondly, on exceptions allowed on the trial of the case before the jury. The exceptions, taken on the plea in abatement, having been withdrawn, and no objections having been urged to the declaration on the motion in arrest, we are relieved from the investigation of any questions arising thereon.

The motion to dismiss was properly overruled. The writ on its face appears to have been signed by a proper officer, and a recognizance of bail duly taken. The objections are without foundation in fact, so far as it appears from a personal inspection of the record. To find the facts otherwise, it would be necessary that testimony *aliunde* be received, and this would be improper on a motion to dismiss, even if it could be received, under other modes of pleading. The Comp. Stat. 242, sects. 4, 5, requiring writs to be signed by a proper officer, and a recognizance to be taken at the time of signing, and providing that if otherwise issued, the *same on motion* shall abate, contemplates the case where such defects are made apparent upon the face of the writ, and can be ascertained by the court, on an inspection of the record. If reliance is placed on other testimony, to show the writ not duly signed, or recognizance taken, if proper in any case, it must be on a plea in abatement, where an issue can be formed under proper pleadings, so that the case can be tried by the court or jury, as the issue shall be closed.

We are, then, brought to an examination of the questions arising on the second bill of exceptions. The action is brought to recover the amount of several calls, or assessments, made on two shares of the capital stock of this company, subscribed for, by the defendant after the several acts of incorporation were passed, in 1835 and 1843, and before the act of 1845. That the defendant subscribed that instrument with his own hand, and that the subscription was altered from one share to two, by his direction and authority, is found by the jury. It is necessary, however, to sustain this action, that there be an express promise by the defendant to pay the assessments, for the 17th section of the act of incorporation, not only gives to the corporation the right of making and requiring payment, but also the power of enforcing the pay-

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ment of those assessments, by creating a forfeiture of all previous payments thereon, and this is the only remedy given by the act. And unless an express promise has been made for such payment, the remedy of the corporation is limited to that prescribed by the charter, and they must proceed by a forfeiture of the stock and payments made thereon. *Medford T. Co.* v. *Gould*, 6 Mass. 40. *N. Bedford T. Co.* v. *Adams*, 8 Mass. 138. *Franklin Glass Co.* v. *White*, 14 Mass. 286. And this doctrine has been recognized in this state in the case of *Essex Bridge Co.* v. *Tuttle*, 2 Vt. 393.

Whether the language used in this subscription is sufficient for that purpose, depends upon the intention of the parties, as ascertained by a proper construction of the instrument. It should contain something more than a promise to become a stockholder or proprietor of a given number of shares. But if it contains in its language, an acknowledgment of a personal liability thereon, and gives the right to enforce that obligation by the usual means of enforcing contracts at law, it would be equivalent to an express promise, and no court would hesitate to say, that the party intended to create such liability for the purpose of giving to the corporation a cumulative remedy, to that given by the charter. In looking at the subscription, we find it clear in its provisions. There is no ambiguity on its face. It first recites, the existence of the charter and the names of the commissioners appointed for opening the books for subscription to its capital stock, "and the subscribers "agree to take the number of shares respectively placed against "their names." If the agreement rested there, the assessments could be enforced only by forfeiture of their stock, but the instrument contains the further provision, "That the subscribers are "*held to pay* to the amount which shall be assessed, and the com- "pany may enforce their claim thereto, with expenses of collec- "tion, by sale of the shares, or *by suit*, or by either of those "means." In this provision, it is obvious they intended to give the corporation their personal obligation for such payment, with the right of enforcing that obligation independent of the right of forfeiture of the stock, and an obligation thus created can be enforced in this form of action.

Several objections are urged against the plaintiffs recovery in this case, not only involving the legal existence of the plaintiffs in their corporate capacity, but also the validity of the subscription

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itself. That the plaintiffs were duly incorporated, and that an organization, in fact, was made under their charter, is stated in the exceptions, and is not disputed. But it is insisted that some of the subscriptions were fictitious, and that the amount required by the act, previous to their organization was not raised. The first section of the act of 1845, provides "That the company may or- "ganize agreeable to the provisions of the act of 1835, so soon as "five hundred thousand dollars shall have been subscribed to the "capital stock." It is evident the legislature contemplated *bona fide* subscriptions, and if they were not so, the organization should not have been effected. We are not called upon, however, to decide upon the admissibility of testimony in proof of those facts, independent of those considerations arising out of the charter, or to what extent such evidence would be available in suits of this character. To guard against fraudulent subscriptions, and to see that this provision of the act was complied with, commissioners were appointed under the 4th section of the act of 1835, whose duty it was to open books and receive subscriptions, and *when the amount required was raised*, to notify a meeting of the stockholders for the election of directors, and of which they are the inspectors; and they are required to certify under their hands, the names of those elected, and by the 5th section of the act of 1845, that organization is to be duly certified to the Secretary of State; and from the certificate of the Secretary, which is made part of the case, it appears that all these requirements of the act have been complied with. As a preliminary question, therefore, before the commissioners could call for an election of directors, and effect that organization, or make their several certificates thereof, they were required to ascertain and find as true, that the full amount was raised by subscription, as required by the act. They were a board appointed by the legislature for that specific purpose, as well as to direct in all those preliminary steps necessary for a legal and proper organization of the company. As the act required their certificate of that organization to be made and filed in the office of the Secretary of State, that certificate must be considered as conclusive evidence of its organization, as well as of the validity and amount of the subscriptions, *so far, at least*, as the question of a legal organization of the company is concerned. It could have been for no other object, but to produce that effect, that the act required that certif-

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icate to be made and filed. In the case of *Rex* v. *the Mayor and Aldermen of London*, 3 B. & A. 271. Lord Tenderdon, C. J., remarked, "That if a matter is left to the discretion of any individual, or body of men, who are to decide according to their own conscience and judgment, it would be absurd to say that any other tribunal is to inquire into the grounds and reasons on which they have decided, and whether or not they have exercised their discretion properly. If such a power is given to any one, it is sufficient in common sense for him to say that he has exercised that power to the best of his judgment." The same doctrine was sustained in *Walker* v. *Devereux*, 4 Paige Ch. R. 271. *Rex* v. *the Justices of Norfolk*, 1 N. & M. 67. *The Brooklin Bank*, 1 Edw. Ch. R. 371. On the production of that certificate, therefore, with the other evidence introduced, of an organization in fact, their existence as a corporation, and their organization under their charter, was proved by the best evidence the nature of the case admits, and the certificate, is as conclusive, upon the validity of the subscriptions, and the amount, and on the question of a legal organization, as upon any other preliminary fact, which they were authorised to find and certify.

It is also insisted that the verdict in this case is wrong, inasmuch as no evidence was introduced, showing that the sum of twenty thousand dollars was expended in the construction of the road, as required by the act of incorporation. The second section of the act of 1835, and the third section of the act of 1843, required the commencement of the construction of the road, and the expenditure of that amount thereon, within five years in one case, and three years in the other, or the charter is declared void. The fourth section of the act of 1843, saves from forfeiture, so much of the road as shall be built within the time limited by the act, so that that which remains unfinished, is alone forfeited. The objection, we think, is not well taken in this action for assessments. For it would be exceedingly inconsistent to say that the corporation must expend that sum in the construction of their road, and at the same time deny them the right and power of collecting their subscriptions for that purpose. That could never have been the intention of the legislature. The charter, in its duration, is perpetual, and this provision of the act is a reservation of the right on the part of the State to cause its charter to be vacated, if the cor-

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poration neglects or refuses to exercise its corporate franchises within that period. But this cause of forfeiture may be waived by the State, an illustration of which, is found in this charter; a forfeiture accrued under the act of 1835, but was waived by the act of 1843, on this very subject.

It is a matter exclusively between the corporation and the State granting the charter. If they waive the forfeiture, no other person can take advantage of it. If they insist upon the forfeiture as a general rule, the corporation has still its legal existence, until a judgment of ouster is had, under judicial proceedings. "It cannot "be tried or put in issue, collaterally or incidentally, in any other "mode than by direct proceedings for that purpose, against the "corporation." Until, therefore, this charter is vacated, by such proceedings, the corporation has its legal existence, and may enforce payment of its assessments. *People* v. *Manhattan Co.*, 9 Wend. R. 351. *Bank* v. *North*, 4 Johns. Ch. 379. Ang. & Ames on Corpt. 664–5 and authorities there cited. That such matter is no defense in an action against one for assessments, was decided in the case of the *Waterford and Dublin Railway Co.* v. *Dalbiac*, 4 Eng. Law & Eq. R. 455.

An important question in this case, arises upon the evidence tending to prove that the defendant's subscription, was obtained by fraud. The defendant requested the court to charge the jury, "that if they believed that *fictitious subscriptions* had been obtained previous to the defendant's, and the *defendant had been thereby induced* to sign for shares, it would be a fraud upon him, and that he would be released therefrom." There was testimony justifying that request, and the neglect or refusal of the court so to charge the jury, gives to the party excepting, the benefit of that fact, so that the question arises, whether that constitutes such a fraud as will avoid this subscription. The court charged the jury, "that all private, unwritten agreements, made by and with, any of the subscribers, inconsistent with the written terms of the subscription, if made at or before signing, either with those who preceded the signature of the defendant, or with the defendant himself, were inadmissible, inoperative, a fraud on the other subscribers, on the plaintiffs, and utterly void, and that if they believed the defendant signed the subscription, and directed two shares to be annexed to his name, they should find a verdict for the plaintiffs."

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It is evident, that if an action had been brought against those prior subscribers, on their respective subscriptions, or those who became such, at the time the defendant subscribed, no agreements or arrangement with them, inconsistent with the terms of their subscription, could be received in evidence, in avoidance of their contract. If they signed that subscription, they are bound by its expressed terms and conditions, and if done under an agreement that they should not be liable, and to induce others to sign, they became parties to the fraud, and would not be permitted to avail themselves of their own wrongful acts to avoid their contract. They would be estopped to deny its binding character and obligation, and be required to discharge to the corporation and all interested therein, that obligation which they have assumed, according to its terms. In depriving them of such matters in defense, the law makes the subscriptions *bona fide*, and requires them to fulfil and answer those expectations and inducements which they have held out for the purpose of procuring other subscribers. This doctrine is enforced by considerations of public policy, as well as of good faith, and is now considered as settled law, in this State. This was the doctrine established in the case of *Blodgett* v. *Morrell*, 20 Vt. 509, where it was ruled that such testimony was not admissible, when offered *by those with whom* such arrangements were made, and who were parties to such fraudulent attempt. And when this testimony is offered *by those who subsequently signed* the subscription, who were not parties to the fraud, and who thereby were induced to become subscribers, the testimony becomes equally inadmissible. For as the prior subscribers are held bound to their subscription, and to carry out to the letter, every inducement they have held forth, no fraud has been practiced upon them to make their subscriptions. And they have no reason to complain, for they see fulfilled and answered, every inducement that was held out to operate upon them. The case is made to stand, in that respect, in the same situation in which they were induced to believe it stood, when they subscribed for the stock. In the case of *Blodgett* v. *Morrill* it was also very properly said, "that if such prior agreements were binding and had been acted upon and the subscriptions discharged, yet it would not be such a fraud as would relieve the defendant, as each subscription is an independent contract; and one, having no legal right to depend upon an-

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other." While the common law gives to all, relief against fraud, it at the same time requires of the other party the exercise of all reasonable care and prudence in observing the ordinary and accessible means of information, and he has no reason to complain of imposition or surprise, where he has been wanting in that care and attention to all those particulars which are within his reach and observation, and by which that imposition might have been avoided. *Omrod* v. *Huth*, 14 Mees. & Wels. R. 651 and note to American cases. 2 Kent's Com. 622 last edition. It is to be observed, that the case does not state, nor was there an attempt to prove in the case, any false representations or statements made to the defendant at the time his subscription was made. He was not, therefore, induced to make the same, by any considerations of that character. And the private agreement with former subscribers, even if acted upon, would not be a fraud that would release the defendant, as there is wanting, not only the exercise of ordinary observation and care, in obtaining that information and knowledge, but on the more definite ground that the defendant's subscription was an independent contract, in no way connected with the others, and from which no matter could arise creating an inducement operating upon the defendant, which in law will enable him to avoid his subscription. He has no more reason to complain, than any purchaser of property can make complaint because similar commodities were sold to others, under different arrangements from that made with him. On the ground of fraud, therefore, the court properly ruled the testimony inadmissible; and independent of fraud, the testimony was inadmissible as contradicting and altering the terms of a written agreement.

There is no want of mutuality to render this contract binding. The provision in the contract, that until the organization of the company, the subscription was subject to the acceptance or rejection of the commissioners, does not affect the defendant's obligation. It does not appear that it was ever rejected by the commissioners, and when the company became organized, and no act was done disaffirming the subscription, it became binding on them, and entitled the defendant to the stock, and the corporation to the assessments. 2 Kent's Com. 465 note. 2 Hamp. R. 19.

It is further insisted, that the defendant is discharged from his subscription, as it was made before the passage of the act of 1845,

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and that by the provisions of that act a fundamental change has been made in the charter, to which he has never assented. The original charter, granted in 1835, was passed with a capital of two millions, with liberty to increase that amount to three millions, for the purpose of constructing a Railroad along the valleys of the Connecticut and Passumpsic Rivers, from the southern to the northern boundaries of the State. The act of 1845, effected a change in the charter of the corporation, as it existed under the acts of 1835 and 1843, by altering the southern terminus of the road, and limiting it at or near the mouth of White River, instead of the southern boundary of the State, and authorizing an organization of the company "as soon as five hundred thousand dollars shall have been subscribed to the capital stock."

As a great portion of the road to be constructed under their original charter was surrendered, and the necessity of that amount of capital obviated, the first alteration very properly gave rise to the last. The subscription was signed or changed from one to two shares, but a few weeks before the session of the legislature, at which the alteration was made. And it is evident, by looking at the subscription, and the conditions therein expressed, that the change was sought for, as beneficial to the corporation, and that the subscription was made with a view to that alteration in the charter. It was not to be binding unless the assessments were appropriated for the construction of that portion of the road lying between Derby line and the mouth of White River. The assent, and even requirement of these subscribers to these alterations, is to be inferred therefrom, and it is not for them to object to such alterations as were necessary to effect their common object, and which permit the application of the money to the purpose, and for the object for which it was specifically subscribed.

Under this view of the act of 1845, we are not called upon to express any opinion upon the question whether any or what subsequent change in a charter will have the effect to discharge subscribers to the stock, from the payment of their assessments. The cases in Massachusetts and New Hampshire are in conflict with the cases of the *London and Brighton R. Co.* v. *Wilson* and the *same* v. *Fanclough*, 37 Com. Law R. 317, and the question is of too much importance to be disposed of in a case where its investigation and decision is not necessarily required.

The judgment of the county court must be affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF WASHINGTON,

APRIL TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

ORAMEL D. MATHEWS *v.* THE WINOOSKI TURNPIKE CO.

Liability of Turnpike Companies, &c.

Where the Railroad Company took a portion of the old road and made a substitute, as their charter provides, *it was held*, that was sufficient to justify the Turnpike Company in using it as a portion of their road, and that their continuing to use it, as a portion of their road, keeping their gates closed and taking toll, and actually repairing this portion of the road, was sufficient to establish it as a portion of the Turnpike Company's road, which they were bound to keep in a state of ordinary safety for the use of travelers, day and night, so far as this could be done by ordinary diligence.

The same diligence is required of Turnpike Companies, which is demanded of towns, to insure safety to travelers upon the highways, and they, as well as towns, are primarily liable to the traveler.

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THIS was an action on the case, in which the plaintiff claimed to recover damages, for an injury, alledged to have been occasioned by reason of the defects and insufficiency of the defendants turnpike. Plea, general issue, and trial by jury.

On trial, the act incorporating the defendants, and the organization of said company under the same, were proved. The plaintiff offered testimony tending to prove, that on the night of the 15th day of August, A. D. 1849, he was driving a horse harnessed to a wagon in which he was riding, on the defendants turnpike, leading from Montpelier village, through Middlesex, to Waterbury, and that in the town of Middlesex an excavation had been recently made, cutting off the traveled path, and leaving an offset of some two or three feet in depth, across the traveled part of the road; that the night being dark, the plaintiff drove off this embankment, or cut, and was thrown out of his wagon, and that his shoulder was thereby injured; that there was no guard or muniment whatever, to prevent travelers from driving into the cut across the traveled path, and that the road at this place was thereby rendered wholly unsafe and dangerous.

The defendants offered testimony tending to prove, that the road, at the place of the accident, was not the original location of their turnpike road, but that some one or two years before this time, the Vermont Central Railroad Company had located their railroad over or near the line of defendants road, and had begun the construction of their Railroad; that said Railroad Company had changed the defendants road at this point, for convenience of travel, by building a by-way, for several rods, parallel to defendants old road, and diverging from it, from two to four rods; that the accident happened on the portion of the road thus laid out and made by the Vermont Central Railroad Company.

The defendants also gave evidence tending to prove, that the defect in the road, which caused the injury, was wholly occasioned by the act of the said Railroad Company, in excavating the portion of road, as before described, for the construction of their Railroad, and that said excavation was made for the track of said Railroad.

It further appeared, that there was, at the time, no other pass for teams, except over the portion of road in question; and the plaintiff gave evidence tending to show, that defendants, ever after said piece of road was so built by said Railroad Company, had

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occasionally repaired the same; that the same had been constantly used and occupied, as a part of the turnpike, and tolls received over the whole road. It did not appear that defendants, or their agents, had any knowledge of the excavations, previous to the time of the accident, but it did appear, that the excavation in the road was made one or two days before the accident, and that the Railroad Company were engaged in constructing their road at this point, at the time of the accident, but had left work for the day.

The defendants requested the court to charge the jury, that if the portion of road on which the injury happened, was without the limits of the defendants' survey, and was built by the said Railroad Co. without the authority or assent of the defendants, then the defendants were not liable for said injury.

Defendants also requested the court to charge the jury, that if the alteration aforesaid, and the excavation, were made by said Railroad Company, in pursuance of the powers given to said company by its charter, then the defendants were relieved of all responsibility for the injury complained of.

The court declined to charge as requested, but did charge the jury, (among other things not excepted to,) that if the road, when the injury was received, though made by the Railroad Company, had been adopted by the Turnpike Company, as part of their turnpike road, and they had made repairs upon the same, and had allowed the same to be traveled as part of their turnpike, and had taken tolls over the same, it had become as between them and travelers upon it, a part of their road, and they would be liable for damages occasioned by defects in that part of the road, to the same extent as in any other part of their road. That, athough the Railroad Company had the right to make the excavation across the turnpike, this would not relieve the defendants from their obligation to provide a place for travel, and if their road at this point had become impassible, or dangerous, in consequence of the excavation, by the Railroad Company, it was the duty of the defendants to take proper and reasonable means, to prevent travelers from falling into danger, or receiving damage thereby; that if the jury found they had neglected their duty in this respect, and the plaintiff had thereby suffered damage, the defendants ought to be held liable therefor.

November term, A. D. 1851, of the county court,— POLAND, J., presiding, the jury returned a verdict for plaintiff. Exceptions by

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defendants to the charge of the court in the particulars above stated.

Peck & Colby for defendants.

1. It was clearly error, in the county court, to hold the defendants liable for not repairing, or providing against a defect or obstruction, of which they had no notice.

2. It was a question for *the court to decide*, whether the *by-road* was adopted by the defendants. *Blodgett* v. *Royalton*, 14 Vt. 289.

The facts submitted did not constitute an adoption; defendants had no authority to use the land taken for the *by-road*, until located, in pursuance of their charter and amended charter. Acts of 1805 and 1832.

3. Defendants are excused from all fault in *making the excavation*, as that was done by force of the Railroad charter, and the defendants could only be held to restore in a *reasonable time*.

F. F. Merrill and *J. A. Vail* for plaintiff.

The charge of the court is sustained by the case of *Willard* v. *Newbury*, 22 Vt. 458. It was the duty of defendants to provide a suitable by-way, and use all proper and reasonable precautions to prevent travelers from passing upon the road while unsafe. The defendants are equally liable for the insufficiency of the by-way, as the original road, for they had adopted it. It matters not whether we call this piece of road a part of their turnpike, because adopted by them, or a temporary by-way, adopted by them; in either case their obligation was the same.

Even if we grant, for the argument, that towns may not adopt a road, still, the reason of this rule does not apply to private corporations; they, like individuals, can bind themselves by an act of adoption. But even towns may adopt a by-way, where it is incumbent on them to make one, as in a case like the one at bar.

However this may be, there is no question but the injury in the case at bar, arose from the insufficiency of the road of the defendants.

By the Court. As to this road, made by the Railroad Company, as a substitute for the road which they had taken, it seems to us, that their own charter provides the mode for this, and that they would not be required to resort to the process pointed out in

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the act of 1835, when the Turnpike Company found it desirable to change the locality of their road.

And if the Railroad Company took the old road, and made a substitute, as their charter provides, that was sufficient to justify the Turnpike Company in using it as a part of their road, and that their continuing to use it, as a portion of their road, keeping their gates closed, and taking toll, and actually repairing this portion of the road, was sufficient to establish it as a portion of defendants road, which they were bound to keep in a state of ordinary safety, for the use of travelers, day and night, so far as this could be done by ordinary diligence. And the jury, under the charge of the court, in its ordinary acceptation, must be regarded as having found this, for the form of the charge is in the conjunctive.

The requests of the defendants, in regard to the charge of the court, seem to place the defense upon this ground, and also, that the Railroad Company alone are liable to the plaintiff for the consequences of any act done by them, and which they had a right to do. But, so far as towns are concerned, this point seems to be determined, by the case of *Willard* v. *Newbury*, 22 Vt. 458. And we see no reason why the same diligence should not be required of Turnpike Companies, which is demanded of towns, to insure safety to travelers upon the highways, and as was held in the last county, if the fault is really that of the Railroad Company, they may be liable to the town, or Turnpike Company ultimately, for the loss.

The point now urged, that this defect might not have come to the knowledge of the Turnpike Company, does not seem to have been distinctly made, in the court below. And although the court might have been required to give general instructions, applicable to all the testimony in the case, yet they would hardly be expected to give specific instructions, as to any particular point of defect, in the testimony in the case, unless specifically requested so to do. And the existence of such a defect in a road of this character, could scarcely have existed for two days, without coming to the knowledge of the defendants.

The case *Batty* v. *Duxbury*, reported in the present volume, on page 155, and decided at the last circuit term in the first circuit, seems to us to have placed this case beyond all question. It was as nearly the same case as it is possible to conceive, at least, in principle. Judgment affirmed.

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Levi Boutwell v. Orison Foster.

Illegal Contracts. Offset.

If a person sell spirituous liquors in this state, without a license, and in direct violation of the positive provisions of the statute, such sale is illegal, and he can sustain no action therefor.

The illegality of such a sale, will equally prevent a recovery thereon, when plead in offset; a court of justice will not lend its aid to enforce payment, for such illegal sale, in any form in which the parties may present it; nor will they, on the other hand, relieve from payment, when it has been made.

Book Account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the facts substantially as follows:—

Items 14 and 41, in the defendant's account, amounting to fifty dollars, are for spirituous liquors, sold by the defendant to the plaintiff within this state, in 1847, and the defendant had no license to sell the same; for the reasons aforesaid, the auditor disallowed the said items.

The county court accepted the report of the auditor, disallowing said items 14 and 41. To which the defendant excepted.

——— ——— for defendant.

F. F. Merrill for plaintiff.

The two items for liquor were properly disallowed by the auditor. *Bancroft & Riker* v. *Dumas*, 21 Vt. 456.

The parties come into court without having made any application, and the law will make such application as is just and legal. But in this case, the whole charge is illegal, and the court will not soil their hands by taking it up and making any application; without *the aid of the court* the claim cannot be allowed, and of course the court will give no aid. This decides the whole question.

By the Court. The judgment of the county court in this case, must be affirmed. The questions arise upon the disallowance, by the auditor, of two items in the defendant's account, being numbers 14 and 41, as designated by the auditor, which

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were for the sale of spirituous liquors in this state, by the defendant to the plaintiff. The auditor has found that the defendant had no license authorising him to make such sales, and for that reason the items were properly disallowed. The sale was illegal, being in direct violation of a positive provision of our statute, and for which no action can be sustained. This was so directly held in *Bancroft* v. *Dumas*, 21 Vt. 456, and indeed, the principles of that case, seem to dispose of all the questions arising in this. For if its illegality will prevent an action from being sustained to recover it, it will equally prevent a recovery thereon, when plead in offset. A court of justice will not lend its aid to enforce its payment in any form, in which the parties may present it. If the parties had agreed that these respective accounts should be applied in payment of each other, and the *application had been made by them*, so that the *items of charge did not exist as a subsisting or unsatisfied claim*, and this had been so stated and found by the auditor, this court would not interfere with that arrangement and payment. 1 C. M. & R. 713, *Owens* v. *Denton*. For whilst they will not enforce such a claim, they will not, on the other hand, relieve from such payment, where it has been made.

The difficulty in this case, is, that no such *application has been made by the parties*, neither has the auditor found as a fact in the case, that such an agreement was made by them. And those items of charge are now presented as subsisting claims in offset to the plaintiff's account, and the court are requested to make the application. But the court will not apply one claim in offset to another, but such as are legal, and which can be legally enforced by action. The result would be the same, if the auditor had found an express agreement of the parties to that effect, for the agreement to pay for the liquors when made at the time of sale, is as void as the sale. No court will enforce such agreement. The parties must carry it into effect themselves, and make the application, or it cannot be done at all. It is further to be observed, that the auditor has found no agreement to that effect, much less the application. An *expectation* that such an application was to be made, is not an agreement, particularly, when the auditor finds that no particular agreement, or conversation, was had about it between them. The charges were properly disallowed.

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JONES TROW *v.* THE VERMONT CENTRAL RAILROAD CO.

Railroad Fences. Degrees of Negligence. Negligence of Plaintiff which will defeat Action. Right to allow Horses in Highway. Charge to Jury.

It is the duty, by law, of the Vermont Central Railroad Company, to erect and maintain such fences, and cattle guards, upon their road, as will prevent horses and other animals, from passing them,—as held in *Quimby* v. *Vermont Central Railroad Company*, (23 Vt. 393.)

The degree of negligence, of which the corporation will be held guilty, in the omission to discharge this duty, will depend upon the locality of their road, and of the particular place, in respect to which the omission occurs. The omission to erect and maintain such fences and cattle guards for a considerable distance, at a place so public and common, as, that it may reasonably be expected that cattle and horses will stray upon the railroad track, is, in law, such a neglect of duty as will render the corporation liable for injuries arising solely from that cause.

But it is the duty of the owner of cattle and horses, knowing the exposed situation of the railroad track, to exercise as much care and prudence in keeping his property from exposure to injuries therefrom, as is required of the corporation in guarding against their commission; and if, in such case, he permits his cattle, or horses, to run in the highway, knowing that there is no obstruction to their passing from thence upon the railroad track, he is guilty of the same degree of negligence as that with which the corporation are chargeable, in permitting their railroad to remain thus exposed.

When there has been mutual negligence on the part of the plaintiff and defendant, and the negligence of each was the proximate cause of the injury, no action can be sustained.

So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, no action can be sustained.

But where the negligence of the defendant is proximate, and that of the plaintiff remote, the action for the injury can well be sustained, though the plaintiff were not entirely without fault; so that, if there were negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury.

If the plaintiff were guilty of negligence, or even of positive wrong, in allowing his cattle, or horses, to run in the highway, from whence, through the want of a fence, which it was the duty of the railroad corporation to maintain, they strayed upon the railroad track, the corporation are yet bound to the exercise of rea-

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sonable care and diligence in the use of their road, and management of the engine and train, and if, for want of that care, the injury arose, they are liable.

Where it appeared that the defendants, a railroad corporation, were guilty of negligence in not erecting and maintaing suitable fences and cattle guards upon the line of their road, and that the plaintiff had permitted his horse to run in the highway, which passed near such railroad, having knowledge that there was no fence or cattle guards, which would prevent the horse from passing from the highway to and upon the railroad track, and the horse did stray upon the track, and was killed by a locomotive engine which was passing, and it appeared that the defendants were guilty of no negligence in the management of the train, or engine, when the injury arose,—it was *held*, that the plaintiff could not recover for such injury.

The question of negligence is a mixed question of law and fact; and it is the duty of the court specifically to instruct the jury, whether the facts, which the testimony tends to prove, will, if found by them to be true, constitute that negligence which will defeat the action.

TRESPASS on the case, for negligence of the defendants in not maintaining proper fences and cattle guards upon their Railroad, whereby the plaintiff's horse came upon the Railroad track and was killed. Plea, the general issue and trial by jury, March term, 1852. POLAND, J., presiding.

The plaintiff gave evidence tending to prove, that the defendants' Railroad, for a distance of about seventy-five rods against and near the "Falls Village," in Northfield, was wholly unfenced, and that at several places within that distance, there was no obstruction to the passing of cattle and horses upon the Railroad track; that there was a highway crossing the Railroad within that distance, and that there was no cattle-guard or obstruction placed there, to prevent animals passing from the highway upon the Railroad track; that there were usually many cattle and horses in the highway, and in the uninclosed land near the Railroad track, and that several accidents had occurred there; that in July, 1850, early in the morning, his horse was seen in the highway, near the Railroad crossing above mentioned, and soon after, upon the track of the Railroad north of the crossing, where he was, when the defendants' engine, with a train of cars, came along upon the Railroad, going northerly, and that the horse ran upon the track, before the engine, until he was overtaken by it and killed. No evidence was introduced to show any negligence in the manner of conducting the engine at the time the horse was killed.

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The defendants gave evidence tending to prove, that the plaintiff's horse had been several times previously in the highway, and that it was with the knowledge and assent of the plaintiff.

The defendants requested the court to charge the jury, that if the plaintiff's horse, at the time of the injury, was in the highway, with the knowledge and consent of the plaintiff, the plaintiff was guilty of negligence, and could not recover in this action. But the court instructed the jury, that if the plaintiff's horse was in the highway by the permission of the plaintiff, yet if the location of the defendants road was such, that by reason of the want of fences and cattle guards, it was rendered so unsafe and dangerous, as that, the want of such fences and cattle guards amounted to gross and culpable neglect on the part of the defendants, and thereby the plaintiff's horse was killed, the defendants would be liable; but that if the plaintiff and defendants were equally negligent, the plaintiff could not recover.

Verdict for plaintiff. Exceptions by defendants.

Peck & Colby for defendants.

In this class of actions, the principle has been adhered to most rigidly, that if the negligence of the plaintiff contributed to produce the injury complained of, he cannot recover though the other party might also have been in fault. The charge of the court below entirely repudiates this doctrine. The jury were instructed to give their verdict against the party who was most in fault. They were to strike a balance between the negligence of the parties. This doctrine has no precedent or authority for its support. The plaintiff was guilty of negligence and want of care in permitting his horse to be in the highway. The horse was *wrongfully* there, and the defendants were under no obligation to guard against his entering upon their Railroad track, under such circumstances, and are not to be made responsible for his loss. If one man's cattle escape from his enclosure on to the land of an adjoining proprietor, he is not liable for any injury they may do, provided they escaped through a defect in the fence, which the other was bound to keep in repair, as it is the latter's own fault that the injury happened. This has been often so ruled, and the principle applies with all its force to the present case. The provisions of the railway act of 1849, do not affect the case, as this injury

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happened before that act took effect. The case of *Baxter* v. *The defendants* decided in Windsor county, is not in conflict with the position taken by the defendants in this case. There, the defendants were held to be in fault, by neglecting to construct a fence which they were bound to make; and in consequence of this omission of duty, the plaintiff sustained the injury.

In this view of the case, the defendants were properly made responsible for the injury. The judgment in the case at bar cannot be sustained without disregarding the rule which has heretofore prevailed in this State, and now prevails in our sister States. *Perkins* v. *Easton and B. & M. R. R. Co.*, 29 Maine 307. 5 Denio 255. *Munger* v. *Tonawanda R. R. Co.*, 4 Comstock's 349. Stat. 519 Sec. 16.

F. V. Randall and *F. F. Merrill* for plaintiff.

1. That the defendants are bound to fence their road generally on the line of their road, is decided by the case of *Quimby* v. *the Vt. Central R. R. Co.* Much more were they, to fence at the place mentioned in the bill of exceptions.

2. Suffering the horse to be in the highway was no want of ordinary care, but on the contrary is a very common practice. The herbage in the highway is treated as the common property of the community. It was not an unlawful act in the plaintiff. The town had never made any by-laws restraining animals from running at large. The whole extent of the plaintiff's liability, was to make good all damages done by the horse, by trespassing on land adjoining the highway.

3. The act of the plaintiff, in suffering his horse to go in the highway, was not an immediate or proximate cause of the injury, and he is not precluded by this act, from a recovery. *Davis* v. *Mann*, 10 M. & W. 545, decides this very point. The same doctrine was held by this court in *Robinson* v. *Cone*, 22 Vt. 213. See also *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566. *Lynch* v. *Nurdin*, 1 A. & E. 30. *Bird* v. *Holbrook*, 4 Bing. 628. *Birge* v. *Gardiner*, 19 Conn. 507. *Bridge* v. *Grand Junction Railway*, 3 M. & W. 244.

The jury must have found that the defendants were guilty "of gross and culpable neglect," which caused the injury. To exonerate the defendants, therefore, it must be held, that a trespasser

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can in no case recover, and that said Railroad corporation are subject to no responsibility, while running their engine and cars on their track, that no protection can be given to man or beast, while upon the track of the railway, against the grossest negligence.

To give impunity and irresponsible license to such recklessness would be monstrous in the view of justice, and highly dangerous and contrary to public policy.

The defendants were not entitled to the charge they requested, for such a charge would rest on the ground, that the bare fact that the horse was in the highway by the consent of the plaintiff, precludes any recovery by him.

The opinion of the court was delivered by

ISHAM, J. The declaration in this case, in substance states, that the defendants are the owners and occupiers of a certain Railroad passing through "Falls Village," in the town of Northfield, and by the side of and across a public highway, leading through that village; and that being such owners and occupiers, it was their duty to construct and maintain fences by the side of their road, suitable to prevent cattle and other animals from passing upon the Railroad track; and also, for the same purpose, to erect and maintain suitable cattle guards at all farm and road crossings. It is averred, that the defendants have neglected their duty in erecting fences by the side of their road, through that village, and in constructing such cattle guards; and that in consequence of this neglect, the plaintiff's horse was found upon the railroad track, and was so injured as to be rendered wholly worthless, by being run upon by an engine of the defendants, while in the use of their road.

It is to be observed that the plaintiff has not in his declaration, nor by evidence on the trial, attempted to charge the defendants with any neglect or want of care in conducting and managing the engine, at the time the injury was committed. We are, therefore to assume in this investigation, that the train was properly conducted, and that there was in this respect, the exercise of that reasonable care and prudence on the part of the defendants and their agents, which the law requires, at the time the injury was committed.

The case on the part of the plaintiff, must therefore rest upon

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a duty, imposed by law upon the defendants, to erect and maintain such fences and cattle guards upon their road, as will prevent horses and other animals from passing thereon, and upon proof, that the injury was occasioned by a neglect on their part to perform that duty.

That a duty of that character rests upon this corporation, must be considered as settled in this State, by a decision of this court in the case of *Quimby* v. *Vt. Cent. R. R. Co.*, 23 Vt. 393. The court there *held*, "that the expense of fencing rests primarily upon the company," and consequently can be taken into consideration by the commissioners, in the assessment of damages; and when this duty exists, an action will lie for any injury arising solely from any neglect therein.

Manifestly that duty becomes more or less imperative, and its performance required greater or less sufficiency and care, depending upon the locality of the road and the place through which it passes. In places thickly settled, and where animals for domestic use and purposes are necessary, much greater diligence and care is required of a Railroad corporation, in the construction of their fences and guards than would be required in places thinly settled or remote from individual habitations, as the danger of injuries from such causes is proportionably diminished. That would be considered gross negligence in the one place, which would not be so considered in the other.

If, in this case, the injury arose solely from the neglect of the defendants to erect and maintain suitable fences and guards for the protection of animals, the charge of the court, so far as the defendants are concerned, is unobjectionable. They have no reason to complain of the degree of diligence and care which the court required them to exercise, for under the instructions given, they were held liable only in cases of gross neglect in making and maintaining such erections. If there were error in this, it was in favor of the defendants, and is that for which they have no cause of exception. The jury have found the defendants guilty of gross neglect in the performance of this duty; and although this neglect may not be considered the proximate, but the remote cause of the injury, their liability is a necessary consequence, unless there are some other facts existing in the case, otherwise affecting it.

The duty of maintaining fences and erecting cattle guards, for

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such purposes, is imposed upon the corporation, not only as a matter of safety in the use of their road, and running their engines thereon, but also as a matter of security to the property of those living near and contiguous to the road. And this arises from the consideration, that they must know and reasonably expect, that without such precautions, such injuries will naturally and frequently arise. And when, for the distance mentioned in this case, no precautions of that kind were used upon this road, and in a place so public and common, we think, as a matter of law, there was that neglect which will render the corporation liable for injuries arising solely from that cause.

The important question presented in this case, arises upon the evidence introduced by the defendants, and the charge of the court thereon. The defendants introduced evidence, showing that the plaintiff's horse had been several times before in the highway, and with the knowledge and consent of the plaintiff. And the court were requested to charge the jury, "That if the plaintiff's horse, at the time of the injury, was in the highway with the knowledge and consent of the plaintiff, he could not recover."

As there was evidence in the case tending to prove that fact, and from which the jury could properly have made such inference, the defendants had a right to insist upon a charge of the court, agreeable to the request; and the neglect of the court so to charge the jury, gives to the defendants the benefit of that fact, in this examination of the case, to the same extent as if found by the verdict of the jury. So that the investigation of this case leads to the inquiry, what effect is had upon the liability of the defendants, by the fact that the plaintiff's horse was permitted to run and remain upon the public highway, in a manner to be exposed to the dangers and injuries arising from the defendants' use of the road?

It is very evident, that if the defendants are chargeable with gross, or any other degree of neglect, from their want of proper care in making and constructing their fences and cattle guards, arising from the consideration that they must have known and expected such casualties and injuries would arise, the plaintiff is chargeable at least with the same degree of neglect, in permitting his horse to run upon the highway, knowing of his exposure and liability to injuries of this character; and it is as reasonable to

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charge the plaintiff with the knowledge and expectation that such injuries would arise, as the defendants, and also to require of the plaintiff the exercise of as much care and prudence in keeping his property from such exposure to such injuries, as is required of the corporation, in guarding against their commission. From the facts, therefore, in the case, the plaintiff was as much in fault and as equally chargeable with neglect, as the defendants; and in each case, their negligence was the remote cause of the injury, and equally contributed to that result.

This is as favorable a view of the case as can be taken on the part of the plaintiff, for in reality, the difficulty in the case, on his part, is increased from the consideration, that his horse was upon the highway without right. Chancellor Kent, 3 Kent's, 536, says, "That the public have no rights in a public highway, but a right of way or passage; and if cattle are placed in a public highway, for the purpose of grazing, and escape into an adjoining close, the owner of the cattle cannot avail himself of the insufficiency of the fences, in excuse of the trespass." And this provision is enforced by statute in this State, Comp. St. 519 § 16. In England, the so placing cattle for grazing would be a trespass, and an action of trespass would be sustained by the adjoining proprietors. *Lade* v. *Shepherd*, 2 Str. 1004. *Stevens* v. *Whistler*, 11 East. 51, and such have been the decisions, in repeated instances, in this country. 16 Mass. 33. 1 Conn. 103. 1 N. H. 16. 1 Cow. 238. 7 Barb. Sup. Ct. R. 298. 2 Smith's Lead. Cas. 176, 184.

This leads our investigation to the question, whether an action can be sustained, when the negligence of the plaintiff and the defendant has mutually co-operated in producing the injury, for which their action is brought. On this question, the following rules will be found established by the authorities. When there has been mutual negligence, and the negligence of each party was the proximate cause of the injury, no action whatever can be sustained. In the use of the words "proximate cause," is meant negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason, "that as there can be no apportionment of damages, there can be no recovery." So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, in such case no ac-

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tion can be sustained, for the reason that the immediate cause was the act of the plaintiff himself. Under this rule falls that class of cases, where the injury arose from the want of ordinary or proper care on the part of the plaintiff, at the time of its commission. These principles are sustained by *Hill* v. *Warren*, 2 Stark. R. 377. 7 Met. 274. 12 Met. 415. 5 Hill 282. 6 Hill 592. *Williams* v. *Holland*, 6 C. & P. 23. On the other hand, when the negligence of the defendants is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant, in the exercise of reasonable care and prudence, an action will lie for the injury. So in this case, if the plaintiff were guilty of negligence, or even of positive wrong, in placing his horse in the road, the defendants were bound to the exercise of reasonable care and diligence in the use of their road and management of the engine and train, and if for want of that care the injury arose, they are liable.

Such was the case of *Davis* v. *Mann*, 10 M. & W. 548 where one unlawfully left his fettered donkey in the highway, and it was killed, by the negligence and carelessness of the defendant in the management of his horses and wagon, Lord ABINGER "held, that he might recover, though the animal was improperly there." In that case the plaintiff was guilty of a wrong in putting his donkey in the highway, and of negligence in permitting him to remain there; but it would probably be considered remote, as the injury arose more directly from another cause. But the neglect of the defendant was proximate, as it occurred when the injury was committed, and as it might have been avoided by the exercise of reasonable care and prudence, he was held liable. In the case of *The Mayor of Colchester* v. *Brooke*, 53 E. C. L. 376. 1 Smith's Lead. Cas. 312, it was held, that a person was not justified in running his vessel upon a bed of oysters, improperly placed in the channel of a navigable river, and which created a public nuisance. The wrong and negligence of the plaintiff, in placing and permitting that deposit to remain in that situation, did not justify the injury committed by the defendant, when it could have been avoided by the exercise of reasonable diligence and care. And this

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rule is sustained in the following cases. *Dimis* v. *Petley*, 69 E. C. L. 282. 1 Man. & Gr. 568. 4 Bing. 628. 1 Ad. & El., N. S. 30. 3 M. & W. 244. 11 East. 60. 1 Scott N. C. 392. 9 C. & P. 613.

These principles have an important application to the case under consideration. The negligence, which caused the injury in this case, cannot strictly be said to be proximate in either of the parties, but is remote, in both cases. It was remote on the part of the corporation; for it is found in the case, that there was no negligence on their part in the management of the train, or engine, when the injury arose, but the neglect existed in not having previously made their fences and cattle guards. It was also remote on the part of the plaintiff, in permitting his horse to remain in the highway, exposed to such injury, after it first came to his knowledge. The injury arose from the combined result of both causes. If either of the parties had done their duty, and conformed to the requirements of the law, the injury would not have been sustained. In such case, no action can be sustained by either of the parties, no more than in the case, where their mutual negligence is the proximate cause of the injury; for the same reason exists in the one case, that exists in the other. From the nature of the case, there can be no apportionment of damages, and no rule can be laid hold of, that settles what one shall pay more than the other. The rule is generally given in the authorities, that in cases of mutual neglect, where it is of the same character and degree, no action can be sustained. This principle has uniformly been sustained in this state, for injuries arising from negligence on the highways. *Noyes* v. *Morristown*, 1 Vt. 353. *Briggs* v. *Guilford*, 8 Vt. 264. *Allen* v. *Hancock*, 16 Vt. 230. And that the rule is the same in relation to the use of Railroads, as to highways, has been directly held in *Beers* v. *The Housatonic Railroad Co.*, 19 Conn. 567.

Upon the facts in this case, the court charged the jury, "That, "if the plaintiff's horse was in the highway by the permission of "the plaintiff, yet if the location of the defendants' road was "such, that by reason of the want of fences and cattle guards, it "was rendered so unsafe and dangerous, as that the want of such "fences and cattle guards, amounted to gross and culpable neglect "on the part of the defendants, and thereby the plaintiff's horse "was killed, the defendants would be liable; but that if the plain-

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"tiff and defendants were equally negligent, the plaintiff could not "recover." The difficulty, under this charge, arises from the want of more specific instructions as to the negligence of the plaintiff, and what would constitute such negligence. Simply to say, that if both the parties are equally negligent, the action cannot be sustained, leaves the whole subject of investigation too indefinite and general. The question of negligence is a mixed question of law and fact, upon which it was the duty of the court specifically to instruct the jury. Where facts in the case are admitted, or where there is testimony tending to prove facts, it is the duty of the court, particularly when requested, to instruct the jury whether those facts, if they find them to be true, constitute that negligence which will defeat the action.

So in this case, as there was testimony proving that the plaintiff's horse was in the highway with his knowledge and consent, and had previously so been, the defendants had a right to request, and it was the duty of the court to charge the jury specifically, and as a matter of law, that that fact, if true, was that degree of negligence on his part, which rendered the case one of mutual negligence; and if, from that mutual negligence, the injury arose, that the action could not be sustained. For the want of this, we think there was error, and that the judgment of the county court must be reversed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF LAMOILLE,

APRIL TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

STILLMAN CHURCHILL *v.* WILLIAM P. BRIGGS.

Ex parte depositions in book actions. Caption.

Ex parte depositions, taken to be used before auditors, are not required to be filed thirty days before the hearing; and where the case, in a caption to a deposition, taken to be used before an auditor, was described as "to be tried by the county "court, at the term next to be holden, &c.," *it was held*, to be a sufficient description of the time and place of trial, and that the deposition was properly received.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed.

The only question arising in this case, was in regard to the admissibility of the deposition, of one William K. Upham, on the

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hearing before the auditor. The caption to the deposition, described the case as "to be tried by the county court, at the term "next to be holden, &c."

The defendant insisted, that the auditor erred in admitting the deposition. The county court, December term, 1851,— PECK, J., presiding, overruled the objection, and rendered judgment on the report, for the plaintiff. Exceptions by defendant.

George Wilkins for defendant.

Cited, Comp. Stat. of 1850, p. 274, § 13. And also insisted, that a deposition, bearing a caption, that it is taken to be used *in a particular court*, can be used only in that court, and that this caption subjected the deposition to the rule applicable to a deposition taken to be used in term time.

——— ——— for plaintiff.

BY THE COURT. The only question in this case, is in regard to the admissibility of the deposition of William K. Upham. It having been decided by this court, (*Brigham* v. *Abbott*, 21 Vt. 455,) that *ex parte* depositions taken to be used before auditors, are not required to be filed thirty days before the hearing, as in the case of trials in the county, and supreme court, it only remains to inquire, whether this deposition is properly taken, to be used before the auditor. The case is described, as "to be tried by the county court, at the term next to be holden," &c. It has never been deemed important, that the deposition should be taken for the very term, at which it was to be used. If the case is described, as to be tried at the next term, and is not, in fact, tried, or, by the rules of court, not triable, at that term, the deposition is, nevertheless, properly taken, and may be used at any future term, when the case happens to be tried. And if this were not so, it would be attended with very great inconvenience in many cases, where depositions were taken at a distance, or of witnesses going out of the state, and long before the case was in such a state of forwardness, that the time of trial could be calculated with certainty. It seems to have been the intention of the legislature, to enable the parties to take depositions in all cases, where suits are pending, by correctly describing them, as pending in court.

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All this applies, with great force, in favor of allowing depositions in book actions, to be taken in the mode this was. It certainly describes the suit correctly, and the time and place of trial, as correctly as in cases tried by the jury, when the time of trial is not yet certainly known. If this mode of describing the trial of book actions was not allowed, as the time is not usually fixed very long before the trial, it would be difficult, if not impossible, in cases where witnesses reside at a distance, to take their depositions at all, certainly not without unnecessary embarrassment There is no doubt the caption of a deposition, in a case like the present, may describe the case, as to be tried before the auditor, on a day certain, but we think it may also be taken in the mode this is.

The filing of the deposition in this case, seems to us a reasonable compliance with the statute, even if it were required to be filed thirty days with the clerk, which, we have said, is not the construction the statute has received. Judgment affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF ORLEANS,

APRIL TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

SPAULDING, FOSTER & CO. *v.* ROBERT VINCENT.

Proceedings of foreign courts,—how authenticated. Written laws of a foreign country. Officers in a foreign country,—proofs of appointment. Proof of new promise.

The best proofs of the proceedings of a foreign court, are the original records; but the testimony usually produced, is either a sworn copy, by one who has compared it with the original proceedings, or an exemplified copy, certified by the clerk and the presiding judge, and the seal of the court, with the broad seal of the province or kingdom, to the appointment of the judge, with the proper certificate from the office of appointment; either of these will be sufficient.

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Proof of the written law of a foreign country, may be by some copy of the law, which the witness can swear was recognized as authoritative in the foreign coun try, and which was in force at the time.

And where a discharge in bankruptcy is plead, and a new promise replied, it is not competent for the plaintiff to prove a new promise by his own oath.

No different proof of the appointment of an officer in a foreign country, is required, from that at home; proof of one exercising the office *de facto*, is usually sufficient in either case.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor appointed, who reported: That, it was admitted that the articles charged were sold and delivered at Stanstead, in Lower Canada, and that the account and credits were correct.

To the account, the defendant plead, before the auditor, his certificate and discharge in bankruptcy, (discharge dated, September 12th, 1842,) obtained from the commissioner of the bankrupt court, in the district of St. Francis, Province of Canada. To which plaintiffs replied a new promise.

The defendant offered in evidence, the original certificate, proceedings and records of the bankrupt court. The plaintiffs objected to the admissibility of the same, on the ground that they were original papers; but the auditor overruled the objection. The defendant then offered copies, which the auditor finds to be true copies of the original papers. Objected to, on the ground that the same were not properly authenticated; the auditor overruled the objection.

The defendant then offered in evidence, an act of Parliament of the Province of Lower Canada. The plaintiffs objected to the admission of the same, but the objection was overruled. It did not appear, from the report of the auditor, that the "Act" was properly authenticated, or that it was legally proved to be in force, at the date of defendant's discharge in bankruptcy.

The parties admitted that no bankrupt law now exists in Canada.

The plaintiff, in order to prove a new promise, offered, as witnesses, Stephen Foster and Austin S. Foster, both plaintiffs in this suit. The defendant objected, on the ground that they were parties to the suit, and not competent to prove a new promise; the objection was overruled by the auditor, and the witnesses per-

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mitted to testify. The residence of the plaintiffs at the time of the defendant's discharge in bankruptcy, did not appear from the report of the auditor. There were other questions raised, and appeared in the report of the auditor, but are not essential to a full understanding of the questions passed upon by the court.

The county court accepted the report of the auditor, and rendered judgment thereon for the plaintiffs. Exceptions by defendant.

J. Cooper for defendant.

A certificate in bankruptcy, in Canada, is a discharge of all debts within the jurisdiction of the court, or provable under the commission.

A foreign bankruptcy bars a debt provable under a foreign commission. Chit. on Con. 266, 267, 263 and 264. 5 East R. 194, *Potter* v. *Brown*, B. & A. 654. *Blanchard* v. *Russell*, 13 Mass. 1. *Bradford* v. *Farrand*, 13 Mass. 18. *Walsh* v. *Farrand*, 13 Mass. 19. *Prentiss* v. *Savage*, 13 Mass. 10.

A new promise to bind defendant, in Canada, must be in writing.

The plaintiffs were not competent witnesses, to prove a new promise. *McLaughlin* v. *Hill*, 6 Vt. 20. *Pratt* v. *Gallup*, 7 Vt. 344. *Scott et al.* v. *Shepherd et al.* 3 Vt. 104. *Sargent* v. *Pettibone*, 1 Aik. 355.

H. F. Prentiss for plaintiffs.

1. There was no proof before the auditor, that there was any bankrupt law in force in Canada, under which defendants procured a discharge. It being a statute law, the law itself should be produced, or, at least, an exemplification of it. 1 Starkie on Ev. 249. *Kenney* v. *Clarkson, et al.*, 1 Johns. 394. 1 Phil. on Ev. 301 and Note. *Hill et al.* v. *Packard et al.*, 5 Wend. 375. *Woodbridge* v. *Austin*, 2 Tyler 364. *Lincoln* v. *Battelle*, 6 Wend. 482. *Territt* v. *Woodruff*, 19 Vt. 182, and cases cited. The act of Parliament, presented before the auditor, was passed in 1843, and not in force when this defendant obtained his discharge, having been passed long since, as the court will see by inspection.

2. The evidence before the auditor, to prove defendant's discharge, was illegal and insufficient. The bankrupt court in Canada being a court of record, having a seal and clerk, their

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proceedings, records and judgments, should be proved, like those of any other foreign court. This must be done by an exemplification, under the seal of the court, properly proved, or by a copy proved to be a true copy, or by the certificate of an officer, authorised by law, which certificate must itself be properly authenticated. And I know of no authority, which admits *original* papers, or records, to prove a foreign judgment. *Delafield* v. *Hand*, 3 Johns. 310. 1 Starkie on Ev. 182 and Notes. 1 Phil. on Ev. 301 and Note. *Pierson* v. *Boston*, 1 Aik. 54.

3. The certificate is dated, September 12th, 1842. What "debts "were provable under it," and where the plaintiff resided at the time, we must learn from some other source than the auditor's report. The auditor does not find that the debt in suit, was, or could be discharged, by the bankrupt law of Canada.

In order that the certificate should discharge this debt of the defendant, the auditor should have found the fact that plaintiffs were residents of Canada, on the 23d day of Juné, 1842.

The opinion of the court was delivered by

REDFIELD, J. The defense, in this case, rests upon a discharge in bankruptcy, obtained in the Province of Canada, where the contract for the sale of the goods sued for, was made. Numerous questions are raised in regard to the proof.

The proof of the discharge, and of the proceedings in the court of bankruptcy, seem to us to be sufficient. The best proof of the proceedings of a foreign court, are the original records. But that cannot ordinarily be produced. The testimony usually produced, is either a sworn copy, by one who has compared it with the original proceedings, or an exemplified copy, certified by the clerk and the presiding judge, and the seal of the court, with the broad seal of the province or kingdom, to the appointment of the judge, with the proper certificate from the office of appointment. The more usual mode, is, a sworn copy. In the present case, we have the original, and the finding of the auditor, that the copies are true copies of the original, and this finding must be presumed to be upon sufficient proof, or upon actual inspection, either of which will be sufficient.

The proof of the existence and of the provisions, of the bankrupt law of the Province, at the time the discharge was obtained,

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seems to have been without the production of any copy whatever of the statute. This, we think, was irregular. Some copy of the law, which the witness could swear was recognized in the Province, as authoritative, should have been produced. Something, which was in force at the time, which was, at least, equal to the copy of the subsequent law, which was put in the case. This is the general rule, as to the written laws of a foreign country, and is specially important in a case like the present, when the particular provisions of the law are important to be known, in order to determine the effect of the discharge.

We think, too, the residence of the plaintiffs, at the time of obtaining the discharge, should be shown, and the place of business of the firm, if any.

If we were at liberty to look into the writ upon this subject, it would only show the residence of the plaintiffs, at the time of bringing the suit.

We think it is not competent for the plaintiffs to prove a new promise by their own oath, upon general principles, and the subsequent law required the promise to be in writing, as does the English bankrupt law.

But the state of the credits would seem to show, that defendant had paid more since the certificate, than the new account. If so, a portion of the payment must, of course, have been intended by him to go upon the old account. And if so, and the payment was general, leaving it to the law to make the application, it will deserve consideration, unless new facts arise, whether it is not fair to conclude the defendant might have intended all his payments, to go towards the old account, and whether, under the circumstances, the plaintiffs were not fairly justified in so applying them. But this question is to be submitted to the auditor, to find new facts, if any exist. Judgment reversed, and case committed to the same auditor, for a new trial.

Note. We are not aware, that any different proof of the appointment of an officer in a foreign country, is required, from that at home. Proof of one exercising the office *de facto*, is usually sufficient in either case.

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Gamaliel Washburn *v.* Curtis Phelps.

Bail. Privilege from Arrest. Waiver.

When a party privileged from arrest, is arrested, he may, within the discretion of the court where the suit is pending, either against the principal or the bail, plead his privilege, and enter an *exoneratur* on the bail bond, or discharge the bail on his own motion.

When the *exoneratur* is entered on the bail bond, or the bail is discharged, it is conclusive upon the parties and all interested.

Giving bail is not a waiver of the privilege from arrest.

This case having been argued, at the April term, by *Mr. Sumner* for the plaintiff, and *Mr. Colby* for the defendant, was held under advisement, until the circuit session, at Montpelier, in October, when the opinion, in which the facts sufficiently appear, was delivered by

Redfield, J. This is a *scire facias* against the defendant, as bail for one Sanford Kinney, in a suit brought originally in a justice's court, by the present plaintiff against Kinney. Kinney not being an inhabitant of the state, was sued by arresting his body, and requiring special bail. The arrest was made while Kinney was attending court, as a witness, and was privileged from arrest.

At the return day of the writ before the justice, Kinney interposed an *exoneratur* on the bail bond, in favor of the present defendant, which motion was overruled by the justice, and the case went into the county court, by appeal. The motion was renewed before the county court, and that court allowed the motion, and ordered the *exoneratur* entered. To this decision the present plaintiff filed exceptions, and removed the case into this court, where the exceptions were dismissed, on the ground that if the county court had any power to entertain the motion, their decision, resting in discretion, must be conclusive, both of the fact and the law, as between the same parties, and the actual entry of the *exoneratur*, placed the question beyond the revision of this court; and if they had no jurisdiction of the question, their decision was merely nugatory, and required no reversal.

Thereupon the plaintiff brought the present suit, and the de-

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fendant pleads in bar of the *scire facias* the facts above stated.

It is now claimed on the part of the plaintiff, that the county court had no authority to entertain the motion for an *exoneratur*.

It has been regarded as settled law in this state, until the recent statute, that a mere privilege from arrest could not be pleaded in abatement of a suit, brought in violation of such privilege. And the courts have often shown themselves somewhat astute, in devising grounds upon which to presume a waiver of the privilege from arrest, by giving bail, or in some other mode. But it is not esteemed any good ground for presuming a waiver of privilege from arrest, because the person takes the ordinary and most expeditious mode of freeing himself from arrest.

He may, notwithstanding, bring an action of false imprisonment, or case, or may seek redress in such other modes as the law affords. And it is very evident, that the English courts of common law do interfere, at all stages in the proceedings, to relieve the bail. 3 Petersdorff's Ab. 74, where it is said, "If the exemption be satisfactorily established, the proceedings upon the bond will be set aside." The case of *Haliday* v. *Colo. Pitt*, 2 Strange 985; S. C. Comyn R. 444, satisfactorily established the rule, that under the English statute of exemption from arrest, if the case is clear of all doubt, the court will discharge on motion, founded on affidavits. And if doubts exist in regard to the fact, or right of exemption, the party is turned over to his remedy, by writ of privilege. The case of *Chester* v. *Upsdale*, 1 Wilson R. 278, recognizes the same rule, but that case was held too doubtful to justify a discharge on motion.

So, too, the case of *Bartlett* v. *Hobbs*, 5 T. R. 689. And the same is again held in *Spencer* v. *Stuart*, 2 East R. 89. And in *Luntly* v. *Battine*, 2 B. & A. 234, precisely the same general rule is declared by ABBOTT, C. J., and the former case reviewed and approved.

We can, therefore, entertain no doubt, that the matter is regarded as coming fairly within the general discretion of the court, when the suit is pending, either against the principal, or the bail, to enter an *exoneratur* on the bail bond, or discharge the bail on his own motion. And when the thing is done, it is conclusive upon the parties, and all interested.

Judgment that the plea is sufficient, and that the defendant recover his costs.

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Cushman Waterman v. James W. Stimpson.

Book Account. Sale.

Where the defendant, and one Miles, made an agreement, in which defendant was to let Miles have a hog, provided he would pay him therefor, and for a previous account, in salts; and the defendant also agreed with the plaintiff, in the presence of said Miles, to let him have the same hog, in exchange for salts, if any thing should happen that Miles did not take it; about three weeks after this contract, the plaintiff took two boxes of salts to defendant's store; after they had weighed one box, and were getting in the other, plaintiff inquired of defendant, if he was going to send the hog, and was informed that there was not salts enough to pay Miles' debt and for the hog, and that he should not send it. The plaintiff then, and before the delivery was perfected, claimed the salts as his own; the defendant informed plaintiff, he should hold them on the contract he had made with Miles, and pass them to his credit. The plaintiff refused so to deliver them, and demanded the property or payment for the same. Miles was not present, and nothing appeared to show that he ever spoke to plaintiff to deliver the salts for him. Under this state of facts, *held*, that defendant was bound to restore the salts, or that plaintiff might treat the property as sold, and charge him accordingly, and that plaintiff might recover for the same in this form of action.

Book Account. The action was commenced before a justice of the peace, and came to the county court by appeal. Judgment to account was rendered in the county court, and an auditor appointed, who reported substantially, the following facts:—

The plaintiff claims $20, for a lot of salts, and that some time in the autumn of 1850, the plaintiff, Emery W. Miles, John D. Miles, and Benjamin Sawyer formed a copartnership, for the purpose of making ashes and manufacturing the same into salts; that after the business had been prosecuted a short time, and before said salts had been made, the plaintiff bought out the said Emery and John, and it did not appear that they, after this sale of their interest, did any thing indicating ownership in the ashes or salts; that a short time before the delivery of the salts to the defendant, the plaintiff also bought out said Sawyer; that previous to the delivery of said salts, said defendant and said Emery had a conversation, during which defendant agreed to let said Emery have a hog, and receive salts in payment therefor, and for an account that defendant had against said Emery, and that debt was first to be discharged and paid. That some three weeks before the salts were delivered by the plaintiff, the defendant agreed with the

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plaintiff to let him have the same hog in exchange for salts, if any thing should happen that said Emery did not have it, the said Emery being present at the time.

That early in the winter of 1850 and 1851, plaintiff employed said Sawyer to draw two boxes of salts to defendant's store, in East Craftsbury, and he accompanied said Sawyer; that said Sawyer's team was stopped near said store, and said Sawyer went in and told defendant that he had brought some salts for said Emery, and that he also told one Smith that the salts belonged to said Emery, the plaintiff being, at the time, within a few feet, but moving from said Sawyer. That one box of said salts were taken in and weighed, and while they were taking the second box through the door, plaintiff inquired of defendant if he was going to send the hog, to which defendant replied that there were not salts enough to pay said Emery's debt and for the hog, and that he should not send it. That the plaintiff then claimed that the salts were his own, and demanded that defendant should pay for same, or let him have them, both of which defendant declined doing, and credited the same to said Emery on book. It did not appear that said Emery ever requested plaintiff to take the salts to defendant for him,— that it did appear that defendant, when he said he should not send the hog, added that if plaintiff would bring an order from said Emery, for the hog, he might have it.

The county court accepted the report, and rendered judgment thereon for plaintiff. Exceptions by defendant.

T. P. Redfield and *J. Cooper* for defendant.

1. Can the plaintiff sustain his action of book account against defendant, when there has been no sale of the property to him? *Bundy* v. *Ayer*, 18 Vt. 497. *Hassam* v. *Hassam*, 22 Vt. 516. *Carpenter* v. *Dole*, 13 Vt. 578. *Read* v. *Barlow*, 1 Vt. 97.

2. The report shows that defendant received the salts as Emery W. Miles' property. And when plaintiff demanded them, or pay for them, and defendant refused to do either, it was a tortious act it any thing, and plaintiff cannot maintain book account. *McCrillis* v. *Banks et ux.*, 19 Vt. 442. *Peach* v. *Mills*, 14 Vt. 371. *Albee* v. *Fairbanks*, 10 Vt. 314.

J. H. Prentiss for plaintiff.

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The fact being found by the auditor, that plaintiff was the owner, this court will not revise the finding on questions of fact. *Edwards* v. *Golding et al.*, 20 Vt. 30.

The only question, then, relates to the sufficiency of this form of action. The defendant did not tortiously acquire possession of the salts, they were delivered to him on terms previously agreed on. On the hearing before auditor, defendant resisted plaintiff's claim, on the ground of purchase from Miles; this establishes plaintiff's right to recover in this form of action. *Hickock* v. *Stevens et al.*, 18 Vt. 111. *Flower Brook Manufacturing Co.* v. *Buck*, 18 Vt. 238. *Stearns* v. *Dillingham*, 22 Vt. 624.

By the Court. There is no question in this case, but that the article which constitutes the item of charge, for which this action is brought, was really the property of the plaintiff at the time it was taken to defendant's store, and that the defendant not only should, but that he expected to account for the same, to some one. And the question is, whether the plaintiff is the person to whom the payment should be made. It is insisted by the defendant, that the property was received on a contract previously made by him, with one Emery W. Miles, and that he has rightfully passed it to his credit, on his books of account.

The auditor has found, that a few weeks previous to the delivery of this property, the defendant and Miles made an agreement, in which the defendant was to let Miles have a hog, provided he would pay him therefor, and for a previous account he had, in this article. The auditor also finds, that about three weeks before the salts were taken to the defendant's store, the defendant agreed with the plaintiff, in the presence of Miles, to let him have the same hog in exchange for salts, if any thing should happen that Miles should not take it. Thus far in this negotiation, there can be no difficulty in understanding the contract, or doubt as to the intention of the parties. Miles was to have the first privilege in purchasing the hog, by delivering salts enough to pay for it, with his previous account. If he failed to do that, then the plaintiff had the right of being the purchaser, and paying for it in the same way.

After this contract, it appears that the plaintiff procured one Sawyer to take his team, and go with him and take two boxes of

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salts to the defendant, amounting to about 631 pounds. The salts were removed into the store, and after one box had been weighed, and they were getting in the other, the plaintiff inquired of the defendant if he was going to send the hog, and was then informed that there was not salts enough to pay Miles debt and for the hog, and that he should not send it. The plaintiff, at that time, claimed the salts as his, and demanded them, or payment for the same, but this the defendant refused to do, and gave credit for the salts to Miles, on his account.

Thus far there can be no doubt about the proper result in the case. The plaintiff had made a contract for the hog, and to pay for it in salts, if Miles did not take it. He took the salts there when Miles was not with them, and there is nothing to show that Miles ever spoke to him to furnish them for him, or that he knew he was going there with them. So far as the plaintiff is concerned, the inference is to be drawn, that he took the salts there on the contract he had previously made, that he might be the purchaser of the hog, if Miles did not take it. The difficulty in the case, arises from the declaration of Sawyer to the defendant, when they first drove up to the store, when Sawyer went in and told the defendant, that he had brought some salts for Miles. The plaintiff was not present when this statement was made, nor does it appear that plaintiff ever knew that such statements, or declarations, had been made to the defendant. And certainly, to make that available in defense, the defendant should have shown that fact, and it should have been found, as a fact in the case, affirmatively by the auditor. That inference this court is not authorised to make, or draw from the evidence, and unless found and stated in the report of the auditor, it must be laid out of the consideration of the case. It also appears, that Sawyer told one Smith that the salts were Miles's. In this instance, the auditor has found that the plaintiff was a few feet from them, but going the other way. If the declaration to Smith could in any event have any effect, it is subject to the same objection as the other. The auditor has not found that these declarations were heard, or came to the knowledge of the plaintiff, and consequently should not enter into an investigation of the case. Removing that consideration from the case, there seems but little ground of dispute. The plaintiff never delivered the salts as the property of Miles, or on his account, but

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claimed them as his own, before the delivery was perfected. The defendant informed the plaintiff that he should hold them, on the contract he had made with Miles, and pass them to his credit. This, without the consent of the plaintiff, he had no right to do, and when the plaintiff refused so to deliver them, and demanded the salts, or payment for them, the defendant was bound to return them, or the plaintiff might treat the same as sold, and charge him accordingly. We have no hesitancy in saying, that the plaintiff has done nothing whereby he should lose the salts, or that would justify the defendant in passing them to the credit of Miles, and that the plaintiff has a good claim on the defendant for their value.

The only matter, about which we consider there is any serious question, is, whether this form of action is proper. The salts have been sold by the defendant, for the sum reported by the auditor, and we think the inference proper to be drawn, that the salts were taken by the plaintiff to the defendant, on his previous contract, and the defendant's refusal to pay him, or let him have the hog, gave him a right to charge for the property he had so retained. Certainly he could have sustained general assumpsit for the value of the salts. The law will raise a privity of contract for that purpose, and will equally so, for any action in form *ex contractu*, adapted to the circumstances of the case, and we see no inconvenience in sustaining this action. It is not extending the action any further than the case of *Flower Brook Manufacturing Co.* v. *Buck*, 18 Vt. 238.

The result is, that the judgment of the county court must be affirmed.

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Cyrus Rogers v. Solomon Steele.

Contract for labor. Effect if dissolved by mutual consent.

Where the plaintiff's claim was for services of a minor son, under a contract made by the minor, with the defendant, it was held, that the plaintiff is so far bound by the contract of his son, that his claim depends upon a proper performance of the contract, and that he would not be entitled to recover therefor, in violation of the contract so made.

But where, under the contract, the minor son of the plaintiff was to labor seven months for defendant, for the sum of sixty-seven dollars, and under the further agreement, if defendant or the minor should find just cause of complaint or dissatisfaction, the contract could be determined by either, by giving two weeks' notice to that effect, and after the minor had worked six or seven weeks, he gave the defendant such notice, but had no just cause of complaint, and the defendant consented that he might leave before the two weeks had expired, if he was determined to leave at the end of that time, and thereupon he left defendant's service, it was held, that this was a mutual relinquishment of the contract, and that, in consequence of the consent thus given, plaintiff might recover for the services rendered.

Book Account. The action was commenced before a justice of the peace, and came to the county court by appeal. Judgment to account was rendered in the county court, and an auditor was appointed, who reported the following facts:—

That in March, 1846, plaintiff's minor son contracted with defendant, (without the knowledge of plaintiff,) to work for defendant, on his farm in Stanstead, seven months, for the sum of sixty-seven dollars, with the further agreement, that if either defendant or minor should find any just cause of complaint or dissatisfaction, either could terminate the contract, by giving two weeks' notice.

That said minor worked about seven weeks, and then gave notice that he should leave the service of defendant at the expiration of two weeks. It did not appear that said minor had any just cause of complaint.

That defendant objected to his leaving, at the expiration of said two weeks, though he expressed a willingness to remain the two weeks; the defendant consented that he might leave before the end of said two weeks, provided he was determined to leave at that time. The minor expressed his determination to do so, and thereupon left the service of defendant, having worked, in all, about seven weeks.

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The county court accepted the report of the auditor, and rendered judgment thereon for plaintiff. Exceptions by defendant.

J. L. Edwards for defendant.

In order that the plaintiff may recover, he must show a *performance*, or an offer to *perform*, on his part, which defendant rejected, or his *readiness to fulfil* the condition, until defendant discharged him, or prevented the execution of that part of the contract to be performed by him. Chit. on Con. 737.

It is believed that no distinction in principle, can be made between *this* case and the cases, *St. Albans Steamboat Co.* v. *Wilkins*, 8 Vt. 54. *Brown* v. *Kimball*, 12 Vt. 617. *Ripley* v. *Chipman*, 13 Vt. 268.

If plaintiff claims his son's wages, he must assume the responsibility of his son's acts in all particulars. *Chilson* v. *Phillips*, 1 Vt. 41.

H. F. Prentiss for plaintiff.

In order to render the defense set up, available, the defendant never should have consented to the boy's leaving, under any circumstances; and when he did so consent, he did it at his peril, and it is too late now for him to say that the boy left without any excuse or just cause.

At the *time* the boy left he had a perfect right so to do, because he had the consent of the defendant, and it is immaterial what *reasons* influenced the defendant to give his consent.

The defense set up, to prevail, should come strictly within the rules of law. To use the language of POLAND, J., in *Green* v. *Hulett*, 22 Vt. p. 190, "The ancient, rigorous doctrine, in relation "to contracts of this kind, has been much modified by the decis- "ions made within a few years; and the party is not allowed to "claim the benefit of any such forfeiture, except when there has "been a clear breach shown on the part of the party who has "performed the service."

BY THE COURT. The claim of the plaintiff in this case, is, for services rendered by his minor son, under a contract with the defendant. It is stated in the report of the auditor, that in March, 1846, the son of the plaintiff contracted to labor for the defendant,

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for seven months, for the sum of sixty-seven dollars, under the further agreement, that if the defendant, or the son, should find just cause of complaint or dissatisfaction, the contract could be determined, by either of them giving two weeks' notice to that effect. The auditor further states, that after the son had worked six or seven weeks, he gave the defendant such notice, but that no just cause of complaint existed, that warranted the son in leaving the service of the defendant.

There is no doubt but that the plaintiff is so far bound, by the contract of his son, that his claim for compensation depends upon a proper performance of the contract, and would not be entitled to recover therefor, in violation of the contract so made. If the case rested upon these facts alone, the decisions are uniform, that no recovery could be had for his services, either on the special contract, or on a *quantum meruit*. He could not recover on the special contract, as it is, in all its provisions, entire, and the performance of the services, and for the whole period stated in the contract, is a condition precedent to the right of recovery. To recover for part performance, an express contract to that effect is necessary. This has been so frequently decided by this court, that whilst we feel no disposition to extend the rule, we do not, on the other hand, feel at liberty to recede from the ground heretofore taken, or in the least, qualify the rules which have been adopted. 17 Vt. 365. 19 Vt. 503. 21 Vt. 301.

He cannot recover on the *quantum meruit*, for there can be no apportionment of an entire contract under such circumstances. Chitty on Cont. 579, 736. 1 Stark. Rep. 65. *Turner* v. *Robinson*, 6 C. & P. 15. *Cutter* v. *Powell*, 6 Tenn. Rep. 320, Ashhunt, J., says, "The only qualification to be found to this rule, exists, "where the contract has been destroyed by the party who is to "make the payment, and yet retaining the benefit of the partial "performance." If he has determined the contract, and refuses to have the services performed, without any reasonable excuse therefor, he may be responsible for the services rendered. Chitty on Cont. 737.

The rule is also well settled, that when the contract is dissolved by mutual consent, before the period at which the wages become due, the party may recover his wages *pro rata*, without any express contract to that effect. Chitty on Cont. 580. *Green* v. *Hu-*

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lett, 22 Vt. 190. *Thomas* v. *Williams*, 1 Adol. & E. 685. In the application of this principle to the case under consideration, we find the facts stated in the case, that after the notice had been given by the son, he expressed a willingness to remain the two weeks, but the defendant consented that he might leave before the two weeks had expired, if he was determined to leave at that time, and that thereupon he left the defendant's service. This can be regarded in no other light, than as a license for him to leave, and as a mutual relinquishment of the contract. He would reasonably so consider and understand it. It has been very properly urged in argument, that had the defendant insisted upon the full performance of the contract by the plaintiff, and withheld his consent for leaving his service, that circumstance might have produced a change in his conduct, and disposition to leave his service. However that may be, we have no hesitancy in saying, that if he intended to avoid paying for his services for that portion of the time in which he labored, two things were necessary to be observed. First, that no just cause of complaint or dissatisfaction should arise on his part; secondly, that he should rely on the contract, and require a performance of its provisions in all its parts, by the plaintiff or his son. In consequence of the consent which he gave for his leaving his service, the plaintiff is entitled to recover for the services rendered.

The judgment of the county court is affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF CALEDONIA,

APRIL TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

MARY J. RAMO *v.* DAVID WILSON, JR.

Bastardy. Defects of form cured by verdict. Motion in arrest of judgment.

The statute, in terms, requires that the original papers should be returned to the county court, in cases of this kind; but if copies are returned, and not objected to, it is the same as if copies had been substituted by order of the court.

The omission of the complainant, to sign the complaint at the bottom, if objected in proper time, might be good cause for quashing the proceedings, but after verdict, this omission cannot be regarded as one of substance.

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All defects in form, in a case of this kind, are cured by verdict. *Robie* v. *McNiece*, 7 Vt. 419.

THIS WAS A COMPLAINT for bastardy. Plea *not guilty*, and trial by jury. The jury returned a verdict that the defendant was guilty.

After verdict, the defendant filed the following motion in arrest of judgment:—

"And now, after verdict for said complainant, and before judg-"ment thereon, the said defendant moves that said judgment be "arrested on said verdict, because he says, that the said complain-"ant did not, at any time before the return of said verdict, upon her "oath in writing, declare herself to be a single woman, with child, "which child being born was a bastard, and is still living, and the "said David Wilson, Jr., with begetting such child, and of being "the father of said child, before any justice of the same county, "or before John Shaw, justice of the peace, and apply to such "justice for a warrant to issue against the said David Wilson, Jr., "and return to the clerk of this court, at any time before said trial, "or during the same, any such original complaint, by her signed "and sworn to, as aforesaid, with the original warrant, together "with a true record of the doings of said John Shaw, or some "other justice of the peace, who might properly recognize between "the parties, or any other sufficient complaint and warrant, upon "which a proper issue of not guilty could be formed for the finding "of said verdict, or to support a judgment on said verdict for the "complainant."

The county court, December term, 1851,— POLAND, J., presiding, overruled the said motion, and duly made an order of affiliation against the defendant.

To the decision of the court overruling said motion in arrest, defendant excepted.

M. Hale and *Davis & Dana* for plaintiff.

1. It is urged, as a matter in arrest, that the complainant did not cause a return of the original complaint exhibited before the magistrate, to be made to the county court, before trial, &c.

This court, as a court of error, have nothing to do with the above question, it being merely a matter of practice, regulated by

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the county court, by its own rules; and furthermore, the practical construction of the statute has been, to permit *copies* of the proceedings before the justice, to be used in the county court. *Sisco* v. *Harmon*, 9 Vt. 129.

2. It is further urged, that the complainant did not exhibit her complaint in writing to the justice, or subscribe any complaint, or make oath to the same. In *Graves* v. *Adams*, 8 Vt. 130, where it was moved to quash, because it did not appear that the complaint was made on oath, the court say, "Yet it does appear by the justice's "certificate, that she was, in fact, sworn to the complaint, before "the warrant issued." And it appears by the certificate of the magistrate, that the complainant was duly sworn to the truth of the complaint, and that she subscribed to the same before the defendant was arrested. Comp. Stat. 423, § 1. *Robie* v. *McNiece*, 7 Vt. 419.

J. D. Stoddard and *J. Potts* for defendant.

By the Court. The statute, in terms, requires that the original papers should be returned to the county court, in cases of this kind. But if copies are returned, and not objected to, it is the same as if copies had been substituted by order of the court. Comp. Stat., Chap. 71, § 5.

The omission of the complainant to sign the complaint, at the bottom, if objected in proper time, might have been good cause for quashing the proceedings. But after verdict, we should not feel justified in regarding this omission as one of substance. It appears the complaint was made in writing, and sworn to before the magistrate. The defendant appeared in the county court, and pleaded the general issue, "that he is not guilty, as the complain-"ant, in her said complaint, hath alledged against him." This, we think, is a sufficient waiver of any mere informality in the complaint. And after a general verdict, the defendant must be taken to be guilty of all the facts charged in the complaint, and all others fairly implied from those alledged; and this, we think, makes a sufficient case to warrant the judgment rendered by the county court, and it is affirmed, and the case remanded to the county court, to be there carried into effect. *Robie* v. *McNiece*, 7 Vt. 419, decides that all defects of form, in a case like the present, are cured by verdict.

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J. A. Hadley v. Arnold Havens.

Lessor and Tenant. Forcible entry and detainer.

Where a tenant entered upon the farm of the lessor, under a contract, or parol lease, for one year, with the stipulations, that he would carry on the farm in a good husband-like manner, build a certain piece of fence, cut certain bushes, gather the stones in a particular field, feed and take care of lessor's cattle upon said farm, and not cut growing timber upon said farm, for fuel, &c.; it was held, that evidence proving a breach of such stipulations, will not sustain an action on the statute for "forcible entry and detainer," and entitle the lessor to recover the possession of the premises, before the expiration of the year.

Chapt. 44, § 30 of the Comp. Statutes, provides, "that when the lessee of any lands, "whether by writing or parol, shall hold possession of the same *without right*, "after breach of any stipulations contained in the lease by the lessee, the person "entitled to the possession may be restored, &c." It was held, that the evident intention of this act, was to give summary relief in those cases, where, for breach of such stipulations, the action of ejectment would lie.

This was an action to recover the possession of certain premises of the plaintiff's, occupied by the defendant, situated in Waterford, as by plaintiff's declaration, which is as follows:—

"In a plea, that said defendant answer to the complaint of said "J. A. Hadley, for that, the defendant is in possession of the lands "and tenaments of the plaintiff, to wit., being twenty-five acres of "land, and the dwelling house, and other buildings, all in said "Waterford, occupied by said defendant, belonging to said plain- "tiff, which he holds unlawfully, against the right of the plaintiff, "as he says, to the damage, &c."

Plea, not guilty, and trial by jury.

On trial, the plaintiff offered testimony tending to prove, that he leased by parol to the defendant, a part of his farm in said Waterford, from April first, A. D. 1850, to April first, A. D. 1851, upon the following conditions and stipulations:—

That defendant was to carry on the farm in a good husband-like manner, and was to deliver to plaintiff, on said farm, for the use of the same, one half of the produce which he should raise on said farm.

And also build a particular piece of fence on said farm, during that spring, and cut a certain piece of bushes, during the summer season,— pick up the stones in a certain field on said farm, and

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was to cut none of the growing timber on said place for wood.

Each party was to furnish one half of the stock, to eat the hay and forage, to be raised on said land; and that the defendant was to feed out said hay on the farm, and take care of and feed the plaintiff's cattle, which he should place there to consume his part of said hay.

The plaintiff also offered to prove, that the defendant had not carried on said farm in a good husband-like manner, that he did not build said fence in the spring, and did not build a part of said fence at all, and that he did not cut said bushes, or pick up said stones, and that he did cut down some growing timber on said farm, to use for wood. That early in the winter, and before the commencement of this suit, defendant gave the plaintiff notice that he should no longer take care of and feed said cattle, which plaintiff had placed at the barn on said premises, to consume his half of said hay, and that thereafter, defendant refused to feed said cattle, and that plaintiff, therefore, was under the necessity of taking said cattle away, and hiring them kept elsewhere.

The court decided, that these facts proved, would not entitle the plaintiff to a verdict, and directed the jury to return a verdict for defendant. To which decision and direction, the plaintiff excepted.

The plaintiff admitted, that there was no stipulation or reservation whatever, in said parol lease, that plaintiff should have any right to re-enter, or determine said lease, upon the failure or refusal of defendant, to perform any or all of the stipulations of said lease, on his part to be performed; and, also, that plaintiff's suit was commenced during the term for which said farm was leased.

M. Hale and *S. W. Slade* for plaintiff.

Insisted, that the statute, when the contract is terminated by lapse of time, and when its stipulations have been violated by the lessee, gives the same remedy absolutely, without conditions or qualifications. Compare §§ 23 and 34 of Chap. 44.

The extension of the remedy to a case of breach of stipulations, is indeed recent, not having been adopted until 1850.

The exceptions show, that plaintiff offered to prove a violation, on the part of defendant, of nearly all the stipulations he had entered into, even that which prohibited cutting down young timber

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for fire-wood; a wanton act of waste, which, independent of the statute, would forfeit his rights under the lease, and justify the plaintiff in re-entering, or proceeding in ejectment. 4 Kent's Com. 106. 1 Hil. on R. Prop. 279 § 15. *Starr* v. *Jackson*, 11 Mass. 519.

J. D. Stoddard and *C. Davis* for defendant.

Insisted, that the statute, at the time of the lease, April first, 1850, conferred the remedy sought in this case, only when there was a wrongful withholding of the demised premises; that the act of 1850 was approved November 12th, 1850, which was after most of the breaches assigned, &c.

It is a general rule in construing statutes, that they are to receive a prospective application, and by construction, never to operate retrospectively, even where they are remedial merely, unless the contrary intention is expressed, or is manifestly apparent. *Whiteman* v. *Hapgood*, 8 Mass. 437. *The Inhabitants of Somerset* v. *The Inhabitants of Deighton*, 12 Mass. 382. Also, *The Inhabitants of Medford* v. *Leonard*, 16 Mass. 215. The 31st section of this statute, provides, in case of recovery in the county court, when there is an appeal taken, the plaintiff shall have judgment for all rent due, up to the time of judgment, notwithstanding it exceeds thirty dollars. We are unable to conceive how the county court, in a case like the present, can render judgment for rent.

By the Court. This is a prosecution under the 30th section of the act, Comp. Stat. p. 308, entitled "Forcible entry and "detainer," in which plaintiff seeks to recover the possession of the premises described in his writ, upon which the defendant has entered under a contract, or parol lease, for one year. The proceedings are not attempted to be sustained, on the ground that the premises are detained by the tenant, after the determination of the lease by its own limitation, as they were commenced before the expiration of the year embraced in their contract, but they are sought to be maintained on that provision of the act, giving this remedy, for the breach of various stipulations contained in the contract.

The case presents the question, whether the evidence offered, proves a breach of such stipulations, as will sustain these proceed-

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ings, and entitle the plaintiff to recover the possession of the premises. The plaintiff offered to prove, that the farm was not conducted in a good husband-like manner; that a particular piece of fence was not built, during the spring, and that part was not built at all; that certain bushes on the farm were not cut, and the stone in a particular field gathered; that some growing timber was cut for fuel; and that the defendant refused, early in the winter to take care of and feed the plaintiff's cattle on the farm, and that he was obliged to take them away and provide for them elsewhere. These various matters were stipulated for, and the defendant has not performed them, and for this, can these proceedings be sustained, when no provision for re-entry for such causes, was stipulated for by the parties?

At common law, a lessor could be repossessed of premises for breach of certain stipulations contained in a lease, although no reservation was made by the lessor, of the right of re-entry. In such case, however, the stipulations must be of that character, the breach of which determined the interest of the tenant in the premises, as much so, as if it had expired by its own limitation, and which would give the lessor the *right of entry and possession.* Such would be the effect of a breach of any stipulation, express or implied, or of any act of the tenant which disaffirmed or impugned the title of the lessor, and which tended to defeat or divest the estate in reversion, as the covenant against waste, and the like. In those cases, no provision for re-entry is necessary, for the tenant's interest is lost, and the lessor has an immediate right of re-entry. But for the breach of the various stipulations contained in a lease, designed for the management and tillage of the land, and the breach of which has no tendency to deny the relation of tenant, or the rights of the lessor as such, the only remedy is, by an action for damages, unless, as a matter of additional security, the right of re-entry was secured in the contract of the parties; in which case, the lessor is placed upon the same footing that he would be, if the interest of the tenant was determined by any other act, and proceedings may then be sustained to be reinstated into the possession of the premises. Co. Litt. 6, 233, 4. Williams' Law of Real Prop. 321. 15 Com. Law Rep. 225. 7 Johns. 232. 4 Kent's Com. 125.

On these principles it is evident, that no proceedings could be

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sustained at common law, to recover the possession of the premises for the breach of any stipulations, complained of in this case. For they were not of that character that would operate as a forfeiture of the tenant's interest, and no right of re-entry for their breach, was provided for in their contract. The question, then, arises upon the construction of our statute. It is to be borne in mind, that this act has created a tribunal of a special and limited jurisdiction, for the purpose of trying those specific cases which are mentioned in the act, and no matter can be prosecuted before that court, but such as are within its express letter. The object of the act was to afford a summary relief, and avoid the expense and delay attendant upon the prosecution of an action of ejectment. It was designed as a statute for relief, not to create new causes of action, or new matter, for the recovery of the possession of real estate. This was manifestly the case, under the act of 1797 and 1842, where this mode of proceeding was allowed in cases of forcible disseizin, and a holding over by the tenant. Ejectment would lie in each of those cases, but this summary process was given as a cumulative remedy. The act of 1850, Comp. Stat. 308, Sec. 30, under which this proceeding was instituted, has enlarged the jurisdiction of that court, in proceedings of this character. Before this act, these proceedings could not have been sustained for the breach of any stipulations in such contract or lease, whatever may have been their character or effect, as such a cause was not specified in the act giving jurisdiction to that court. The only remedy was an action for damages, or in ejectment, for the breaches of those stipulations, which operated as a forfeiture of the tenant's interest in the premises. When this act, therefore, provided, "That when "the lessee of any lands, whether by writing or parol, shall hold "the possession of the same *without right*, after breach of any "stipulation contained in the lease by the lessee, the person enti-"tled to the possession may be restored, &c." The evident intention was, to give this summary relief in those cases, where, for breach of such stipulations, the action of ejectment would lie. That a proper construction of this act would confine its effect to those cases, is evident from its language; when the words are used, "after breach of any stipulation contained in the lease," reference is necessarily had to the former words of the act, which provides that such breach must have the effect to render the pos-

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session of the tenant "*without right*," or in other words, that it should forfeit his estate therein, so that he can no longer justify his possession by the contract or lease. This throws the case upon the ground where the matter rests at common law, the statute having simply the effect of affording a speedy and summary restitution of the premises, in cases where the party would otherwise be under the necessity of resorting to the action of ejectment. Any other construction, would, in its effect, be manifestly unjust and inequitable. For if these proceedings can be sustained, for the breach of any and every stipulation in the lease, the tenant may have gone into the possession of the premises under such a contract, performed the labor for the growth of his crops, and done most of the work of the season thereon, and then be deprived of the whole by the act of his lessor, for the non performance of that, which comparatively, is an unimportant stipulation of the parties. Such results could not have been intended, and to warrant them, would require the most clear and unequivocal legislation. As the matters offered to be proved, would be insufficient to sustain ejectment, we think they are equally so to sustain these proceedings. The result is, that the testimony offered, was properly excluded, and the judgment of the county court must be affirmed.

ROSWELL PIERCE *v.* FREDERICK W. HOFFMAN AND SAMUEL W. FISHER.

Fraud. Evidence of other fraudulent dealings when admissible.

In an action of trespass for property, which the defendant claimed was fraudulently purchased by the plaintiff, it was held, that testimony of other fraudulent dealings between the parties about the same time of the one in question, is admissible, and should go to the jury.

TRESPASS for a wagon. Plea, the general issue, and notice that defendants would prove, that defendant Hoffman was a creditor of one Joel Butterfield, that said wagon was attached and sold as the property of said Butterfield, defendant Fisher acting as officer. Trial by jury. On trial, the plaintiff gave evidence tending to

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prove, that he purchased the wagon of said Butterfield, about the first of June, A. D. 1850, before the same was finished, for the price of forty dollars, and executed his note to said Butterfield for that amount; that plaintiff bought and paid for iron axletrees for the same, and that a day or two before the wagon was attached by defendants, that plaintiff took possession of the same, also that plaintiff had paid the note he gave said Butterfield for the wagon.

The defendants gave evidence tending to prove, that said Butterfield was insolvent, and in failing circumstances, at the time of the sale of said wagon to plaintiff, and that the sale was fictitious and colorable, and made for the purpose of avoiding the payment of debts by said Butterfield; that plaintiff was privy to such intent, and that Butterfield, a few days after the attachment of the wagon, absconded to Canada; also, that said Butterfield had a horse in his possession, which belonged to him, but the plaintiff fraudulently claimed to own the same, to prevent the same from being attached by the creditors of said Butterfield, and that said horse was taken to Canada by said Butterfield.

Also evidence tending to prove, that a short time before the wagon was attached by defendants, the plaintiff brought an action against said Butterfield, and trusteed one Bemiss, and that said suit was fictitious and fraudulent, and brought for the purpose of preventing the creditors of said Butterfield, from attaching the debt against Bemiss.

The plaintiff objected to the admission of this testimony, but the court overruled the objection, to which the plaintiff excepted. The defendants also introduced copies of the attachment and proceedings against said Butterfield, upon which said wagon was sold.

The charge of the court to the jury was not objected to, except so far as it related to the evidence of other fraudulent dealings between plaintiff and said Butterfield. Upon this part of the case, the court charged the jury, that if they found that about the same time of the transfer of the wagon by Butterfield to the plaintiff, the plaintiff was fraudulently concealing other property of said Butterfield, to keep the same out of the reach of attachment by his creditors, they should consider this as evidence tending to show what was the intent of the parties in the transaction in question, but that before any unlawful intent was inferred from other dealings between the parties, the evidence ought to be clear that these

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other dealings and transactions were in fact fraudulent. And if the sale of the wagon was upon good consideration, and *bona fide*, the same could not be avoided, because the parties had been engaged in other transactions which were fraudulent.

The jury returned a verdict for the defendants; the plaintiff excepted to so much of the charge of the court, as is above detailed.

H. S. Bartlett and *E. A. Cahoon* for plaintiff.

Insisted that the first and well established rule, governing in the production of evidence, is that the "evidence offered must correspond with the allegations, and be confined to the point in issue." That this excludes collateral facts, for the reason that such evidence multiplies issues, hence tends to mislead jurors, surprise the adverse party, embarrass litigation, try not what is set down for trial, but something else. 1 Greenleaf's Ev. 120–1–2.

And also insisted that the sale of the wagon must be proved to be fraudulent, in and of itself, by direct evidence, before the *intent* or knowledge of plaintiff can be inquired into by reference to foreign or extraneous transactions.

A. J. Willard and *Davis & Dana* for defendants.

Insisted, that to invalidate the sale of the wagon, it was necessary to show fraudulent *intent* in Butterfield, and knowledge of such *intent* in plaintiff. *Edgell* v. *Lowell*, 4 Vt. 405. *Bridge* v. *Eggleston*, 14 Mass. 250. *Bridge* v. *Hall*, 12 Pick. 89.

That this *intent* and *knowledge* may be proved by circumstances; and also cited *Burbank* v. *Cary*, 11 Wend. 83. 2 Wash. Dig. 548 § 26.

By the Court. The only question in the present case is, whether the testimony of other fraudulent dealings between the parties about the same time of the one in question, was properly admissible in the case. The general rule of evidence will undoubtedly exclude other independent transactions. But in a question of intention, like the present, such evidence is admitted, even in criminal cases of the gravest importance.

It is usually the only mode of proving such matters. Purpose and intention, especially when there is an obvious motive for disguise, is only to be reached by inference, and safe inference can

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almost now be made from a single transaction, especially when the form of the act is in itself indifferent and of hourly occurrence. This kind of evidence is always resorted to for the purpose of establishing the fact of guilty knowledge, in uttering forged paper or coin, and is carried much farther in our practice than in England. But where any considerable doubt rests upon the cotemporaneous transactions, they weigh nothing, and so the jury were told in this case.

But in cases of this kind there is a probable connection in a series of sales, nearly at the same time, the result of which, is to strip a man of his available property and enable him to leave the country. It would be impossible, generally, to show the object and intention of the parties, without allowing everything to come into the case, which might fairly be supposed to have a connection with the general design to be ultimately accomplished. A fraudulent transaction between the same parties, which had no connection with the particular failure, might not be competent evidence. But all which regarded the very failure and absconding, and it would seem the testimony objected to had such connection, should go before the jury. If this were not so, it would be in the power of parties, by subdividing such transactions, to altogether destroy the force of the evidence resulting from their general character.

The charge of the court upon this point seems to have been unexceptionable.

Judgment affirmed.

REUBEN CHAPLIN AND OTHERS *v.* L. D. HILL AND JOHN STILES.

Prudential Committees of School Districts, their power. School Districts, their control of School Houses.

By implication, the prudential committee of a school district must have the right to occupy the school house, when the school is in operation; but the statute or implications growing out of the general powers and duties of the prudential committee, does not give him the exclusive control of the school house, in his district, that power must be in the district.

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Chaplin et al. v. Hill et al.

Where a district, at a meeting for that purpose, voted to have a private school in the school-house, and nothing appeared, but if it had been permitted to proceed, it would have answered all the purposes of a public school, and been open to all the children in the district, and taught all the branches of common school instruction enumerated in the statute, and no others; under these circumstances, it was held, that there was nothing inconsistent with the rights of the district, in allowing the school to continue there *for the time being merely*; but that the district clearly could not confer any exclusive right to the possession of the school-house, for any definite time, upon any one.

It was also held, that the privilege, which was conferred upon the plaintiffs was of a legally beneficial character, and the defendants for causelessly and wantonly disturbing them in the enjoyment of the same, are liable to an action, and that *case* is the appropriate remedy.

The inhabitants of the school district have no estate in any form, in the property belonging to the district, and the district alone can bring trespass *quare clausum fregit*.

This was an action on the

CASE, to recover damages against the defendants, for preventing the plaintiffs from occupying a certain school-house. Plea, general issue, and notice of special matter, and trial by jury.

It was admitted on trial, that school district No. 6, in Waterford, was a regularly organized district, and that the school house in said district, belonged to said district, and that the plaintiffs were all residents and voters in said district. It was also admitted that defendant Stiles, was at the time, the prudential committee in said district.

The plaintiffs then introduced evidence tending to prove, that in the month of September, 1848, the plaintiffs employed a teacher, and set up a private school in the school-house in said district, the teacher being a daughter of one of the plaintiffs, and the other plaintiffs sending their children to the school. That before the school commenced, the defendant Stiles was applied to for the key of the school-house, which he declined to furnish.

The plaintiffs then procured a key which would open the door, and the school was kept for one or two days, when the defendants went and fastened the door of the school-house, upon the inside; an application was thereupon made to the clerk of the school district, to call a school meeting, and that a school meeting was called and holden on the second day of October, 1848, at which meeting a vote was passed to have a private school in the school-house.

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The plaintiffs offered the records of the district, of the proceedings of this meeting in evidence, to which defendants objected, as not supporting the plaintiffs' declaration; but the same were admitted, to which defendants excepted.

The plaintiffs then proved, that after said meeting plaintiffs again commenced their school in the school-house, that the same was continued for three days, when the defendants went to the school-house, and removed the stove and pipe, and windows of the house, whereby the house was placed in such condition, that plaintiffs were prevented from continuing their school in the house, and that they were obliged to procure another place for the same.

The defendants claimed, that this evidence was not sufficient to entitle plaintiffs to recover, especially in this form of action.

But the court instructed the jury, that upon the facts admitted in the case, if the jury found the facts, which plaintiffs' evidence tended to prove, to be true, the plaintiffs were entitled to recover.

The jury returned a verdict for the plaintiffs. To the charge of the court and refusal to charge as requested the defendants excepted.

E. A. Cahoon and *H. S. Bartlett* for defendants.

1. The action should be *trespass* instead of *case*. The plaintiffs, whether legally or otherwise, had the exclusive possession of the *locus in quo*, and held, as they alledge, by virtue of a *lease* from the district. The acts charged to have been committed by defendants, by which the possession of plaintiffs was disturbed, were directly the result of force, hence *trespass*. How then, since injury to possession is the gist of the action, can case be sustained? For injuries to the reversion, the landlord must sue in case; and for injuries to the possession, the tenant must sue in *trespass*.

The case of *Bakersfield Cong. Soc.* v. *Barker & Potter*, 15 Vt. 119, relied upon by plaintiffs does not support their position. In that case, the court held the possession to be in a third person,—the Union Society, instead of plaintiffs; on page 129, WILLIAMS, J. says, "the plaintiffs could have sustained *trespass*, had the Union Society surrendered to them the exclusive possession." It thus becomes, we think, a conclusive authority for defendants.

2. The district records were improperly admitted to prove a lease or dedication of school-house to the plaintiffs. And there is a fatal variance between the declaration and proof.

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The declaration alledges a lease of the school-house to plaintiffs "on the 2d day of October, 1848, during the remainder of the fall then commenced, or until it should be occupied by the district for a winter school." The record proves nothing of the kind.

3. The district had no power to grant the use of their school-house to the plaintiffs, for the purposes alledged. Existing solely by virtue of the statute, its corporate rights are strictly defined, and are extended to no purpose save that specially contemplated by law, viz. a *common school.*

4. Plaintiffs are *joint tenants in common* with defendants, and hence cannot sue each other at common law, excepting actions of account, or where there has been a destruction of company property.

5. The suit can be sustained, if at all, only by the district.

O. T. Brown and *J. D. Stoddard* for plaintiffs.

Defendant Stiles can no more justify, under authority of his office, the act complained of, than any other member of the district. The school-house belonged to the district, as a municipal corporation, having the dominion, direction, subject to the use and enjoyment of the same by its individual members, for the purpose of keeping schools therein, which might be supported by private contribution, or under the authority of the district.

The district, therefore, for the removing of the windows by the defendants, and carrying away the furniture, or for any other direct injury to their property, &c., can maintain *case* only.

If these inferences are sound, the school house being unoccupied, the plaintiffs had the right to use it for a subscription or private school, independent of any direction of the district; this disposes of the question of *variance. People* v. *Runkle*, 9 Johns. 147. *Duke of Newcastle* v. *Clark*, 2 Moore, 666. *Bakersfield Cong. Soc.* v. *Barker et al.*, 119.

By the Court. One question made in this case seems to be, how far the prudential committee of a school district may be said to have an exclusive control of the district school-house. This must depend upon the statute. The district must possess this control for all legitimate purposes, unless it is given to the prudential committee by the statute.

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But the statute does not seem in terms to have conferred any such exclusive control of the school-house upon the committee. He is to keep the school-house in "good order;" to see that fuel and furniture, &c., are provided; and in regard to employing and removing teachers, he has, by express statute, the exclusive control. And, by implication, he must have the right to occupy the school-house, when the school is in operation, or else his power to appoint and remove teachers would be of very little importance. Beyond this, we do not perceive anything in the statute, or the implications growing out of the general powers and duties of prudential committees of school districts, which should give them the exclusive control of the school-house, in their district. If not, that must be in the district.

The question then arises, whether the districts can give permission to have their school-houses used for such purposes as private schools. They evidently could not put them to uses altogether aside of the general objects of their erection. They could not, at once, erect them into academies or colleges. But we think the statute did purpose to give them considerable latitude in this matter. They may raise money by subscription, or apportioned upon the scholars who attend the school, for the support of schools. This school was probably somewhat different from one supported in either of these modes, and was not a public school. But nothing appears, but if it had been permitted to proceed, it would have answered all the purposes of a public school, and been open to all the children in the district, and taught all the branches of common school instruction enumerated in the statute, and no others.

Under these circumstances, we see nothing inconsistent with the rights of the district, in allowing the school to continue there *for the time being merely.* The district clearly could not confer any exclusive right to the possession of the school-house, for any definite time, upon any one. But while they could not use it for a school themselves, we do not perceive any perversion of the general rights and duties of districts, to allow them to license others to give similar instruction therein, upon terms which they approve.

This being a power of this subordinate and limited character, which was conferred upon the plaintiffs, they clearly could not sustain an action of trespass *qu. clau.* for a violation of it. If they have any redress for the inconvenience which they sustained, it

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must be by an action upon the case. And it seems to us, that the privilege which was conferred upon the plaintiffs was of a legally beneficial character, and that the defendants, for thus causelessly and wantonly disturbing them in the enjoyment of the same, are justly liable to an action, and if to any, to this action. As to the form of action, it seems to us that the case, in principle, is not essentially different from that of *The Bakersfield Society* v. *Barker & Potter*, 15 Vt. 119. The inhabitants of the school district have no estate in any form, in the property belonging to the district. The district alone could bring trespass *qu. clau.* undoubtedly.

The plaintiffs are not *directly* damnified by the act of the defendants; the damage to them is not the injury to the school-house, but this *is* the damage to the district. The injury to plaintiffs, is *indirect*, it is the *consequential* injury to their privilege of using the building for the time being, for a particular purpose. The injury to them would have been no more, if the school-house had been absolutely destroyed, and no less, if they had been denied the exercise of their right or privilege in any other way.

Judgment affirmed.

PAUL GRAY *v.* JOHN FLOWERS.

Plea in abatement. Demurrer.

A plea in abatement, where defendant pleads, "that the said writ abate, because "he says that said writ was served upon this defendant, more than sixty days "before the time therein appointed for trial, to wit.: said writ was served July "5th, 1851, and the time set for trial therein, is September 4th, 1851, and has not "been served at any other time since said 5th day of July, and this the said de "fendant is ready to verify, by the record, Wherefore, he prays, that the same "may be quashed," was held sufficient on special demurrer.

And it was also held, that as this plea verifies the facts, by the record, it may be treated as a motion to dismiss, and as such is sufficient.

In a plea in abatement, praying that the writ may be quashed, is equivalent to a prayer of judgment of the writ, and one prayer of judgment, in one plea, is sufficient.

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Gray v. Flowers.

THIS was an action on the case, for selling and warranting to plaintiff, a certain horse as sound, but which was unsound, originally commenced before a justice of the peace, and came to the county court by appeal.

The defendant filed the following plea in abatement:—"And "the said John Flowers, comes, &c., and pleads, that the said writ "abate, because he says, that said writ was served upon this de- "fendant, more than sixty days before the time therein appointed "for trial, to wit.: said writ was served July 5th, 1851, and the "time set for trial therein, is September 4th, 1851, and has not "been served at any other time since said fifth day of July, and this "the said defendant is ready to verify, by the record, Wherefore he "prays, that the same be quashed, and for his costs."

To this plea the plaintiff demurred, setting forth as cause of demurrer, "that the said defendant hath not in his said plea, prayed "judgment of said writ, and that the plea aforesaid is otherwise "uncertain, insufficient, and wants form."

The county court, December term, 1851,—POLAND, J., presiding, adjudged that the plea was sufficient, and that the writ abate. Exceptions by plaintiff.

Bartlett, *Bingham* and *Roberts* for plaintiff.

It is not sufficient, that the subject matter of the plea is a just ground of abatement, but it must be formally set forth, with a proper commencement and conclusion. 2 Saunders 209, note 1.

In *Hixon* v. *Binns*, 3 T. R. 186, the plea concluded with praying judgment, "if," (instead of "of,") the plaintiff's bill, which was held bad on special demurrer. And the authority of that case was recognized in *Landon* v. *Roberts*, 20 Vt. 286.

Where the defendant pleads in abatement to the writ, matters apparent on the face of it, he should begin, as well as end his plea, by praying of the writ, and that the same may be quashed. But when the plea is for matter dehors, as misnomer, &c., the plea should only conclude with that prayer. 12 Modern 525. 10 East 87. 20 Vt. 286.

H. S. Bartlett for defendant.

In the case at bar, the demurrer being special, "can reach no "other faults in form, than those specially assigned for cause of

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"demurrer; for as to others, it is in effect, a general demurrer, &c." Gould's Pl. 468, § 19. 1 Saunders' Pl. & Ev. 499.

The defendant "prays that the writ may be quashed, and for "his costs," the legal meaning and effect of which is the same, as prayer of judgment of the said writ, and this being the case, "it is "the duty of the court to render such a judgment as the legal "effect of the pleading requires." Gould's Pl. 298, § 156.

By the Court. The only defect in this plea, which is urged upon our consideration, is, that the plea does not begin and conclude by praying judgment of the writ, and that the same abate. It is said in *Landon* v. *Roberts*, 20 Vt. 289, that such an omission would scarcely be regarded as fatal. And the case of *Hixon* v. *Binns*, 3 T. R. 186, is there doubted, one point which is there intimated, that a defect in a plea in abatement might be regarded as fatal on special demurrer, and not on general demurrer, has never been considered sound. The other defect in the plea there, was, that in the conclusion it prayed judgment "if" the writ, instead of "of" the writ, which in strictness made the plea nonsensical, or rather amounted to a prayer that the writ should not abate.

Asking if a thing shall be done, often implies a desire to the contrary. It is said, that praying that the writ may be quashed, is not equivalent to a prayer of judgment of the writ, that it abate. But this we do not comprehend. The two things seem to us the same, and we think one prayer of judgment in one plea, is as good as more.

And as this plea verifies the facts, by the record, it may be treated as a motion to dismiss, and as such is sufficient. Judgment affirmed.

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William M. Curtiss v. George Greenbanks.

Book Account. Tender.

The balance found due by the auditor, is conclusive, so far as the account is concerned, on both parties, if no exception is taken to the ruling of the auditor in ascertaining that amount.

Where bank bills were placed on the table in the presence of the plaintiff, the amount stated, and capable of being taken into immediate possession, if plaintiff had been willing to receive it, and was duly paid to the auditor, and is brought into court, it was held, that this was a good tender, and sufficiently conformable to all legal requirements.

Where money is tendered and refused, the person tendering it is at liberty to use it as his own, all he is under obligation to do, is to be ready at all times, to pay the debt in current money, when requested.

But if the tender is of specific articles, the property tendered cannot be retaken, or disposed of in any way, by the person tendering.

Book Account. Judgment to account was rendered in the county court, and an auditor appointed, who reported the facts substantially as follows:—

The defendant, (who owned a woolen factory, in Barnet, Vt.) in the month of November, 1849, through an agent authorized for the purpose, hired the plaintiff, as a master carder, and one Robertson, as a master spinner, to work in his factory, the plaintiff at $1.25 per day, and the said Robinson at $1.50 per day. They came on to Barnet from Lawrence, Mass., on the 17th day of December, 1849, to commence work for defendant, under said hiring.

The defendant was unwell at the time, and when plaintiff reached Barnet, was violently sick and deranged, and remained so about three weeks after plaintiff's arrival. When the defendant had so far recovered, as to know that the plaintiff and said Robertson had come, he sent for them to come to his room, and had an interview with them. On this occasion, the defendant told plaintiff and said Robertson, that owing to his sickness, it was uncertain when he should be able to start his mill, and that he could not afford to pay them the wages agreed upon, and that under the circumstances, if they insisted on the contract price, he would pay them up, and let them return; but if they saw fit to remain, he would do what was

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right, with regard to their wages. To this last proposition, plaintiff and said Robinson assented and agreed, and they remained until the mill was put in operation, in March, and then commenced work at the business for which they were hired. Up to this time, plaintiff worked for defendant, whenever any thing offered, and as occasion required, and spent some time at work on defendant's machinery in the mill, but for the most part had his time to himself.

The defendant offered to prove, that plaintiff was not a skillful hand at the business, for which he was hired. To this, plaintiff objected, on the ground that defendant's remedy, in that case, would have been to discharge him, failing to do so, he was liable for the contract price. The auditor admitted evidence on this point, and it was proved that plaintiff was not equal to the recommendation which was sent to defendant, by the agent who hired him; that he never had charge of a card-room before, as master carder. This testimony was considered by the auditor, and had an influence in fixing upon plaintiff's wages.

Although defendant so far regained his health, as to start his mill and keep it in operation, from some time in March, to the middle of May, he was then obliged to give up the business, (in consequence of ill health,) and leased his factory on the 15th day of May, 1850; a settlement was then made with said Robertson, who accepted seven shillings per day, and the plaintiff's account was made out at five shillings per day, and presented to him for settlement on several occasions, to which he made no objection, except as to amount of wages. That on one occasion, before the commencement of this action, plaintiff was sent for, and went to defendant's sick room, for the purpose of attempting a settlement; the account was then laid out on the table, and the balance, $53.00 in bank bills and 44 cents in change, was placed, with the account, on a table in the room, in plaintiff's presence, by defendant's book keeper; and he was told the same was ready for him, though it was not formally presented, or handed out to him. No objection was made to the kind of money.

Subsequent to this, the defendant ascertained that one Stevens had charged him one dollar extra, for use of a team, which the plaintiff was furnished to go to St. Johnsbury, on defendant's business, but which he drove around by Danville on his return, on his

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own account; defendant added this to his account against plaintiff, making plaintiff's balance one dollar less than was tendered as above, (if deemed a tender,) and this sum of $52.44 was placed in the auditor's hands, on the hearing, and is brought into court, though not the identical money previously offered. It did not appear that the defendant placed the said money in any particular person's hands, and kept the same in readiness for plaintiff; nor did it appear that plaintiff had ever called for the same.

The auditor found due plaintiff on the 15th day of May, A. D. 1850, a balance of fifty-two dollars and forty-four cents.

The county court, December term, 1851,—POLAND, J., presiding, accepted the report and rendered judgment for the plaintiff thereon. Exceptions by defendant.

M. Hale and *A. Underwood* for defendant.

1. The tender in bills was good, not being objected to on that account. 3 Stephens N. P. 2603—4. *Snow* v. *Perry*, 9 Pick. 539. *Warren* v. *Mains*, 7 Johns. 476.

2. The finding of the auditor, shows that the plaintiff must have understood it as a tender for the account, and he might have taken it if he would. It is also manifest, that the only reason of his declining, was, he claimed *more*. *Sargent* v. *Graham*, 5 N. H. 440.

3. A tender of $53.44, is a good tender for $52.44, as the former embraces the latter, &c. But in book account there is no *plea* of a tender. The technicalities of *pleading* are dispensed with. If the money in fact be tendered before the suit, it is sufficient to prove the fact before the auditor, and lodge the money with the auditor, provided the same be returned by him into court, with the report. 1 Selwyn N. P. 152—3, and note 83. 3 Stephens N. P. 2605. *Dean* v. *James*, 4 B. & A. 546. *Woodcock* v. *Clark*, 18 Vt. 333.

4. That defendant did not bring the *same identical money* into court, makes no difference. One gold eagle tendered, is no more or less than another gold eagle brought into court. Formerly a tender *after dark* was not good, but now a tender in the evening is held good. *Thomas* v. *Hayden*, cited in *Sweet* v. *Harding*, 19 Vt. 587.

J. Potts for plaintiff.

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Insisted, that the tender should be held inoperative, for the reasons,— 1st, that it was insufficient as to amount. 2d, that it was not properly kept and presented to the auditor.

It appears from the auditor's report, that the defendant did not keep the money in readiness for plaintiff, and that the money produced before the auditor, was not the same, either in denomination or quality.

This was defeated by defendant producing a less sum before the auditor, than that tendered. The plaintiff could not have avoided the tender, if otherwise good, by a demand and refusal of a larger sum than that tendered, but must demand the precise sum. Chit. on Con. 802, and cases there cited. *Thetford* v. *Hubbard*, 22 Vt. 440. And can it be said that defendant may tender such sum as he pleases, and produce another and less sum?

By the Court. The auditor, in this case, has reported the sum of $52.44, as being the balance due the plaintiff on the 15th day of May, 1850. This balance, so far as the plaintiff's account is concerned, is conclusive on both these parties, as no exceptions *by the plaintiff* were taken to the ruling of the auditor, in ascertaining that amount. We are, therefore, to regard that sum as the balance really due at that time to the plaintiff.

The question arising in this case, is upon the tender of $53.44, made on this account, shortly before the commencement of this action. No question has been urged, but that a legal tender can be made in cases of this character, if all the legal formalities have been observed in making it. The auditor has reported, that at the time, the parties met for the purpose of making a settlement, that the above sum, as now allowed by the auditor, was then presented by defendant, as the balance due from him. On that occasion, the sum of $53 in bank bills, and 44 cents in change, was counted out, and placed with the account, on the table in the room, in the plaintiff's presence, and he was informed that it was ready for him. If the character of the money tendered had been objected to, it is evident that it would not amount to a legal tender. The authorities, however, are uniform upon the subject, that a tender in bank bills is good, if the creditor places his refusal to receive the money on other grounds, or makes no objection to the tender, on the express ground that it is in bank notes. The auditor

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has stated, that no objections of that character were made, but were confined to the sum allowed for his wages. There can be no doubt either, but that there was a sufficient offer of the money to answer the requirements of the law in this respect. It was placed on the table in his presence, its amount stated, and capable of being taken into immediate possession, if he had been willing to receive it, and this was duly paid to the auditor, and is in court. This tender is good, and sufficiently conformable to all legal requirements, and particularly so, as no objections to any informality were made; and, unless made at the time, it will be a waiver of such objections, as well as of the character of the money tendered. Smith's Mer. Law 625, 7. 4 B. & Ad. 546. 2 M. & W. 86. 8 M. & W. 298. 2 Greenl. Evid. § 600 to 604.

The objections to this tender, are urged, first, that the amount originally tendered was $53.44, but the amount paid into court was but $52.44. This last sum is all that is really due the plaintiff, and all he can honestly demand, as found by the auditor. The amount of the indebtedness as agreed to by the defendant at the time of the tender, was really less by one dollar, in consequence of the last item in defendant's account not being then reckoned, as the defendant was then ignorant of the charge, but it was within the knowledge of the plaintiff, and which he suppressed.

It is not for him, therefore, to insist upon an acknowledgement so made by that tender, under an ignorance of facts, which it was his duty at that time to have removed. The defendant has done all that should be required of him to do, to be ready at all times to pay the amount really due, when demanded, and at the proper time to pay the same into court. It has also been objected, that this tender is of no avail, from the fact, that the money paid into court, was not the identical money previously offered or tendered. And it has been insisted, that to keep a tender good, the party must keep the identical money offered, ready to be paid over, on demand, or in a proper time to pay the same in court. This principle, whatever may be the rule in relation to the tender of specific articles, can have no application to the tender of money, or that which the parties have treated as equivalent to the current coin of the country. It is to be borne in mind, that a tender of money does not extinguish the debt. It simply bars the claim to damages and interest, and the costs of an action, if the matter is prosecuted.

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By the tender, if refused, the money does not become the property of the person to whom the tender is made. Hence, the person tendering is at liberty to use it as his own, all he is under obligation to do, is, to be ready at all times to pay the debt in current money, when requested. In this respect, there is an important distinction between the tender of money and that of specific articles. In the case of specific articles, a tender duly made, is a discharge of the debt. The title to the property thereby passes to the person to whom the debt is due, whether accepted or not. For this reason, the property tendered cannot be retaken, or disposed of in any way by the person tendering. This distinction, clearly established by the authorities, affords a sufficient reason why the identity of the money in this case, becomes immaterial, for that particular money was never the plaintiff's. It remained the property of the defendant, on the refusal to accept it. All that the plaintiff can ask of the defendant to do, and all the defendant is required by law to do, to keep good his tender, is, to be ready at all times, when requested, to pay the debt in the current coin of the country, or when prosecuted, to pay the same into court, and this the case finds to have been done by the defendant. From the facts reported by the auditor, we think the tender was sufficient, and constitutes a good defense. The judgment of the county court must be reversed, and judgment rendered for the defendant on the report.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF ESSEX,

MAY TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

LYMAN HIBBARD *v.* SENECA FOSTER AND OTHERS.

Trespass quare clau. Possession. Damages.

In an action of trespass *quare clausum fregit*, the plaintiff having title to one half of the premises, it was held, that he might recover the whole damages.

Where B. entered upon a certain lot, claiming to be the owner of the same, and during the winter seasons took timber therefrom, from time to time, it was held, that these acts, (he having good title to one half,) gave him possession of the whole lot, as against every one but the true owner. *Sawyer* v. *Newland*, 9 Vt. 383.

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It was also held, that this possession B. might convey to his grantees, and that it is not necessary that these acts of possession should be renewed from year to year, to enable B., or his grantees, to maintain trespass. All that is required, is, that there should be continued claim.

TRESPASS *quare clausum fregit*, for breaking and entering the plaintiff's close, described as number 19, second division, drawn to the original right of John I. Clark, in Brighton, and cutting and carrying away timber therefrom.

Plea, general issue, and notice that they would justify under license from plaintiff, and trial by jury.

On the trial, it was admitted by the defendants, that by the proprietor's records, of the town of Brighton, lot number 19, in the second division, was drawn to the original right of John I. Clark. The plaintiff then introduced a certified copy of the last will of John I. Clark, proved in the state of Rhode Island, and also duly recorded and allowed in this state, by which, after certain legacies, &c., he gave to his daughters, Anne E., wife of Oliver Kane, and Harriet Clark, the residue of his estate, real and personal, in equal moieties, and to their several and respective heirs and assigns.

The plaintiff, also, introduced a copy of the record of a deed from Robert Hare and Harriet C. Hare, wife of the said Robert, to Orvis L. Brown, dated October 15th, 1830, conveying the original right of the said Clark, as lot number 34, the first division, &c., the said Kane and wife having conveyed their interest to said Hare and wife.* Also, a copy of a deed from Orvis L. Brown, to Jonathan D. Stoddard, dated April 4th, A. D. 1835, of the same premises, so conveyed by said Hare and wife. Also, a copy of a deed from Jonathan D. Stoddard to the plaintiff, dated March 12th, A. D. 1838, conveying the same premises. The plaintiff then proved, that Harriet C. Hare, wife of Robert Hare, was, before her marriage, Harriet Clark, and daughter of said John I. Clark; that Oliver Kane married another daughter of said Clark, and that Mrs. Kane and Mrs. Hare were the only surviving children

* The description of the premises, in the deed from Hare and wife to Orvis L. Brown, was as follows: "The whole of the original right of the late John I. Clark, "Esq., which we hold as devisees of the said Clark, and by virtue of a certain "deed of release, to us executed by Oliver Kane and his wife Eliza, in a lot desig- "nated as right, number thirty-four, in the township of Random in the State of "Vermont."

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of said Clark. The plaintiff then introduced evidence tending to prove, that after said Orvis L. Brown took said deed from the said Robert Hare and wife, and before he conveyed to said Stoddard, as aforesaid, the said Brown claiming to be the owner of said lot, number 19, entered upon the same, and during the winter seasons took therefrom timber, from time to time, in considerable quantities, but never leased or enclosed any part of said lot, or made any improvements thereon, except to take timber, as aforesaid; that said lot was wild land, and some miles from any cultivated or inhabited lot. And also, that said Stoddard and the plaintiff had, since the dates of their respective deeds, claimed to own said lot, and had agents in the vicinity of the lot to look after the same, and paid the taxes assessed upon the lot.* The plaintiff then gave evidence tending to prove, that the defendants, in November or December, 1848, entered upon said lot, and cut two pine trees standing thereon, and carried away one of them and manufactured the same into shingles.

The defendants insisted, and requested the court to charge the jury, that plaintiff had shown no sufficient title to the lot, to enable him to sustain his suit against them.

But the court declined so to charge the jury, but upon this part of the case, instructed the jury, that if they found that said Orvis L. Brown, after he took his deed from said Hare and wife, and before he deeded to said Stoddard, entered upon said lot, claiming the same under his said deed, and took timber therefrom from time to time, and that said Stoddard, while he held the deed of said lot, and the plaintiff, since he took the deed from said Stoddard, had continued to claim title to said lot, and to pay the taxes thereon, it constituted sufficient proof of title in the plaintiff, to enable him to maintain an action of trespass against a mere stranger to the title, who should enter and cut timber upon said lot.

The jury returned a verdict for the plaintiff, for four dollars damages.

The plaintiff claimed that he was entitled to recover full costs,

* The following amendment was made to the bill of exceptions, by the presiding judge of the county court: "That said agents frequently went on to the said "lot, to examine, and see if any timber had been cut therefrom, and at one time "went on to said lot with the plaintiff, and showed him the lines of the lot,—this "was before the cutting by the defendants complained of."

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upon the ground that his title to the lot was in question in the case. The court ruled, that plaintiff was entitled to recover full costs.

To the charge of the court, as above set forth, and to this last decision, defendants excepted.

George C. Cahoon for defendants.

Claimed, that the bill of exceptions did not fully present all the questions in the case, that the omission probably was caused by the press of business at the time the exceptions were drawn; that plaintiff's counsel, without notice to defendants' counsel, had applied to the judge and procured an amendment to the bill of exceptions, which, in the estimation of defendants, so materially altered the aspect of the case, that if incorporated into the case, they should not be required to go to trial, until they have an opportunity to apply to the county court, to have the bill of exceptions amended also in their behalf.

And insisted, that plaintiff was not entitled to full costs, as the damages were less than seven dollars; and as the defendants neither set up title nor claim to possession of the premises, but simply a permit from plaintiff to do the act complained of.

William Haywood, Jr. for plaintiff.

Insisted, that the conveyances and will put into the case, show that plaintiff has a perfect title to an undivided half of lot number 19,— putting the case upon this ground, plaintiff may lose half of his verdict. *Chandler* v. *Spear*, 22 Vt. 388. But Orvis L. Brown had a deed of the whole lot, and he entered upon it claiming title, and being seized by his entry, conveyed to Stoddard, and Stoddard conveyed to plaintiff. Bare seizure, even by wrong, is a degree of title to land, (2 Bl. Com. 209,) which may be conveyed by the person seized. *Bailey* v. *March*, 3 N. H. 274. *Breck* v. *Young*, 11 N. H. 485. *Cushman* v. *Blanchard*, 2 Greenleaf 266.

And such a conveyance from a person, who was himself seized, makes a sufficient title to sustain ejectment, and of course it is sufficient to sustain trespass against a mere wrong doer. *Brown* v. *Edson*, 22 Vt. 357. *Bryant* v. *Tucker*, 19 Maine 383.

By the Court. The plaintiff's title to one half the lot, must be regarded as sufficiently made out, we think, from the original

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source. The deed of Robert Hare and wife, clearly describes the whole right, but in reciting the sources of their title, the deed of Kane and wife, is described as a deed of number 34, as it is. And having title to one half, the plaintiff must recover the whole land in ejectment, and the whole damage, we think, in trespass *quare clausum fregit.* That was certainly so at common law, when trespass is brought merely for *mesne* profits, and equally in an action of ejectment, the plaintiff, who recovered the land, would recover damages for his own portion of the land, and also for his co-tenant.

The case of *Chandler* v. *Spear*, 22 Vt. 388, was trespass *de bonis*, and in that action, which is merely personal, one tenant in common can only recover his proportion of the common chattel, and the same rule was thought applicable when the action was in that *form*, notwithstanding the damages grew out of an injury to land. But we are not aware that any question has ever been made, but that in real and possessory actions, one tenant in common may always recover the damage due his co-tenant as against a mere stranger.

But it seems obvious, that the ground upon which the court below put the case, is sound. The act of Brown gave him possession of the whole lot, as against every one but the true owner. *Sawyer* v. *Newland*, 9 Vt. 383.

This possession he might convey, and undoubtedly did convey to his grantees. And we are not aware, that it has ever been regarded as important that these acts of possession should be renewed from year to year, to enable the person, or his grantee, to maintain trespass. All that is required is that there should be continual claim. This is shown by the case, before the amendment, and more in detail, by the amendment.

There can be no doubt the plaintiff's title and right of possession, was sufficiently brought in question in the trial, if what we have heard in this court is to be regarded as any indication of the course of trial below. *Powers* v. *Leach*, 22 Vt. 226. Judgment affirmed.

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ARAUNAH SPEAR *v.* GEO. E. HOLMES, WILLARD KING, LEONARD HATCH AND ZENAS SNOW.

Scire facias. Jail bond. Sheriff and his sureties.

Where a debtor was committed to jail on *mesne* process, and gave a jail bond, it was held, that before a suit could be sustained for an escape, there must be a demand made for the bond, and a refusal to assign it, that the statute contains no exceptions, and the court cannot make them, unless in the most obvious cases of necessity.

It was also *held*, that the fact that the jail bond was found in possession of the family of a former jailor in another State, affords no necessary presumption, that a demand would not have been available.

SCIRE FACIAS against the defendants upon recognizance entered into by them, for the faithful performance by the defendant Geo. E. Holmes, of the duties of the office of sheriff of Essex county.

The cause of action alledged is, that said defendant Holmes permitted one Freeman B. Peck, (who was committed to jail on *mesne* process at the suit of the plaintiff,) to escape. The writ was returned *non est inventus*, as to said defendants Holmes and Hatch, but all the defendants appeared.

Plea, *Nul tiel* record of judgment against sheriff, and notice that defendants "will prove in defense of this action, that said Freeman "B. Peck was duly released from his imprisonment, mentioned in "the plaintiff's declaration, by virtue of a jail bond, in the penal "sum of two hundred dollars, made in due form of law to said "Holmes, as Sheriff of the county of Essex, dated the 11th day "of April, A. D. 1842, signed by said Peck, William Haywood, Jr. "and Orange Haywood, which bond said Holmes, as sheriff as "aforesaid, received, and released said Peck from his said imprisonment, agreeably to law, and that said Holmes did not suffer "said Peck to escape, as set forth in said declaration. And the "defendants will further insist that said judgment, in favor of said "Spear against said Holmes, recovered before Bass, justice of the "peace, is void, for the reason that the service of the writ therein "was void, not being in conformity to the statute."

By agreement of parties, the issue was tried by the court.

The plaintiff introduced in evidence a certified copy of the rec-

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ord in the suit in favor of the plaintiff against Freeman B. Peck, and also the execution on said judgment, and the officer's return thereon. The plaintiff also introduced a certified copy of the record of a judgment recovered by the plaintiff against said defendant Holmes, by *default*, for the default of the said Holmes in permitting the said Peck to escape. And also, what purported to be the original writ in said case of Spear against said Holmes. The defendants objected to the admission of said writ in evidence, because there was no evidence to show it to be the original writ in said suit, and because the same was not in any manner authenticated; and also to the admission of said writ and record of judgment, for the reason that the return of the officer on said writ was so irregular and defective that the judgment against said Holmes was wholly void. Said return was as follows:

"STATE OF VERMONT, } St. Johnsbury, Aug. 26, 1847.
" *Caledonia County.* }

"Then by virtue of this writ to me directed, I attached as the "property of the within named defendant one old hat, and on the "same day, I left a true and attested copy of this attachment, with "a list of the property so attached endorsed thereon, at the last "place of defendant's abode in St. Johnsbury, with one Isaac "Woods now resident therein, and of sufficient discretion, said de-"fendant having left this State, and having no known agent or "attorney in this State, with whom to leave said copy."

"Attest,

——— ——— *Dep. Sheriff.*"

The court admitted the same, to which defendants excepted. The plaintiff also gave in evidence, a copy of record of defendants' recognizance declared on.

The defendants then proved, that after the said Peck had been committed to jail in Essex county, on the writ in favor of the plaintiff, and while he was still in jail by virtue of said commitment, on the eleventh day of April, A. D. 1842, said Peck as principal, and Orange Haywood and William Haywood, Jr., as sureties, executed a jail bond in due form of law, to the said Holmes, as sheriff and keeper of said jail, which bond was dated on said eleventh day of April, A. D. 1842. That said bond was duly delivered to one Nelson, who was at that time deputy jailor under said Holmes, and that said Peck was thereupon allowed to

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depart. It did not appear that said bond was ever in the actual possession of said Holmes, or that any demand was ever made upon him at any time, to assign said bond to the plaintiff.

The bond was procured, by the defendants, from the wife of said Nelson, in Massachusetts, since the commencement of this suit. It appeared that said Holmes continued to reside in this State until just before the commencement of the suit in favor of said Spear against him, when he removed from this State to the State of Illinois, where he now resides; and it did not appear that after his removal, he had any attachable property in this State. The said jail bond was produced on trial.

The plaintiff claimed and requested the court to decide, "that a sheriff's term of office having expired, and he having removed from the State, and leaving in the State, no known property or estate, on which service of process may be made, to fetch him within the jurisdiction of the court, disposes with the obtaining a judgment against him, preliminary to a suit against his bail, and the same also dispenses with any demand of an assignment of a jail bond, which such former sheriff may have taken in the premises, preliminary to any suit against such sheriff."

But the court declined to accede to such request or to sustain any such doctrine, and rendered judgment in favor of the defendants. To which decision plaintiff excepted.

Geo. C. Cahoon for plaintiff.

The case shows that the wife or widow of one Nelson, residing in Massachusetts, had the jail bond in possession, and that said Nelson at some time, was keeper of said jail, and it is claimed that said bond was made, and delivered to him at that time; and had the same subsequently been delivered to and accepted by said Holmes as sheriff, it might have confirmed and given vitality and validity; but going to the archives of the jail, no such bond was to be found, and if demand had been made of Holmes, he could not have assigned, for he did not possess it, and being without the State at the time suit was brought, it became utterly impossible, within the jurisdiction of the court to make such demand. Likening this to the case of a note, demand and notice back are waived, by the removal or absconding of the party. When the maker absconds before the maturity of the note, no demand will be necessa-

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ry. *Putnam* v. *Sullivan*, 4 Mass. 45. *Widgery* v. *Munroe*, 6 Mass. 449. *Hale* v. *Burr*, 12 Mass. 86. *Jones* v. *Fales*, 4 Mass. 251.

William Haywood, Jr. for defendants.

The plaintiff cannot recover in this suit, for the following reasons.

1. He has not obtained a legal judgment against said Holmes. Comp. Stat. Chap. 28 § § 56, 75, 58, 59.

The service of the writ against Holmes was void.

The plaintiff did not make proper proof of the judgment. He offered a paper as the writ in the action, without any proof that it was the writ. *Treasurer* v. *Holmes*, 1 Aik. 111.

It appears that Holmes did not suffer Peck to escape, but the jailor under Holmes took a jail bond agreeable to the statute.

By the Court. This is a suit against the sheriff and his bail, upon his recognizance. The statute makes it indispensable that the creditor, before bringing *scire facias*, should recover judgment against the sheriff. And it further provides, that when such judgment is rendered by default, the sureties may make the same defense, which might have been made in the original action. This ought not perhaps to be extended beyond defenses upon the merits. But to this extent there can be no doubt, the judgment in this case against the sheriff being by default, is defensible by the sureties and by Holmes, who had no notice in fact.

The suit against the sheriff is for an escape. But the facts in the case show that no escape was in fact suffered. The debtor Peck was committed on *mesne* process, and gave a jail bond, and no demand whatever was made upon the sheriff, or any one, for the bond, and the statute is express, that no suit for an escape shall be sustained, until after such demand and a refusal to assign it. The statute contains no exceptions, and we cannot make them, certainly not, unless in the most obvious cases of necessity. And in the present case the sheriff remained for a long time in the state, and it is presumable the demand would have been made, if the creditor had supposed it would have served him any purpose to have the bond put in suit.

The bond seems to us to be a valid bond on *mesne* process. And

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the fact that it was found in the possession of the family of a former jailor, in another state, affords no necessary presumption, that a demand would not have been available. It does not appear how long the bond had been out of the state, or that the sheriff on demand would not probably have produced it, and assigned it.

Non est inventus on plaintiff's execution, the 29th day of August, A. D. 1843. Suit against sheriff brought the 7th day of August, 1847, and Holmes left the state just before this, giving four years to make demand of the bond, and for any thing we know, it would have been assigned at any moment. Judgment affirmed.

HARLOW B. WALTER *v.* DANIEL B. DENISON.

Executions against towns. Authorized Officer.

The authority issuing a writ of execution, may authorize some one specially to serve the same, when it is against a town.

A demand made upon the very person who is treasurer of the town, though not made upon him as treasurer, but as an officer of the town, (if made twelve days before the levy of the execution,) for payment of the execution, is sufficient.

TRESPASS for two cows. Plea, general issue, and notice that defendant would justify the taking of said cows under legal process, as an authorized officer. Trial by jury, January term of the county court, 1852,— POLAND, J., presiding.

On trial, plaintiff proved, that defendant took, drove away, and sold the cows sued for, and that the same were the plaintiff's property, and no question was made by defendant, as to the sufficiency of the proof of the plaintiff, as to the taking by defendant, or of the plaintiff's title to the cows.

The defendant then offered, in evidence, a copy of the record of a judgment recovered by A. H. Bartlett, against the town of East Haven, before Samuel Densmore, justice of the peace, on the 14th day of August, A. D. 1849, and also an execution upon the same judgment, dated the same 14th day of August, and the defendant's

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return thereon, and also an authorization of the defendant to serve said execution on the back of the same.

The plaintiff objected to the admission of said papers in evidence, for defects in the authorization thereof, and also, because he claimed the defendant could not be legally authorized to serve an execution against a town.

The court overruled said objections, and admitted said papers in evidence. To which decision plaintiff excepted.

It was admitted, that the two cows mentioned in defendant's return on said execution, are the same sued for, and that the taking of the same by defendant was a taking upon said execution; also, that plaintiff was an inhabitant of said East Haven, and a tax payer in said town. The plaintiff then introduced evidence tending to prove, that at the time defendant held said execution for collection, he called on Merrit H. Walter, who was treasurer of said town of East Haven, and one of the selectmen of said town, and also upon Mr. Lund, who was likewise one of the selectmen of said town, for the payment of said execution, and asked them what they were going to do about the same, and that said Walter replied, they, as selectmen, should not do anything about it; that defendant then said that he should have to collect it, and Walter replied, that he would have it inch by inch. That when the defendant applied to said Walter and Lund, as aforesaid, he spoke to them, as selectmen, and that no other demand was ever made on said Walter to pay said execution, than as above stated. The defendant objected to this evidence, but the same was admitted by the court.

The court instructed the jury, that defendant's return was sufficient *prima facie* evidence in his favor, that he called on the treasurer for the payment of said execution, before he levied on the plaintiff's property, but that his return was not conclusive, and might be contradicted by other evidence. That if said Walter was treasurer of the town, and defendant called on him as an officer of the town, to pay said execution for the town, such demand was sufficient to authorize the defendant to levy said execution on plaintiff's property, if the same was not paid in twelve days after such demand, although the defendant did not especially state to him, that he demanded it of him, as treasurer, but as one of the selectmen. The jury returned a verdict for the defendant.

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The plaintiff excepted to so much of the charge of the court as is above stated.

George C. Cahoon for plaintiff.

The statute does not contemplate, that an authorization should be made in a case where a town or a county are a party, for fear that such process would fail of service. That such could be the fact, is an absurdity upon its face, and if such an event could not in reality take place, as a failure of the service of process, by reason of the perpetuity of the corporation, then it should be left to the proper officers of the law to serve it. The town would always be found, and have sufficient funds on which levy might be made, and a certificate of the magistrate, that for want of a proper officer, &c., would be false on its face, and apparent to every one that it was so; therefore, it should not be regarded by courts otherwise than false, and if so viewed, it must here end the case.

The next proposition is, that if said authorized person is to be viewed as an officer, the case does not find that he has complied with the requirements of the statute, (Comp. Stat. 473, § 6,) in making demand on the treasurer, without which the levy would be void, and defendant a trespasser.

Bartlett, *Bingham* and *Roberts* for defendant.

1. The authorization of an officer, is a power delegated specifically to the discretion and determination of the justice, and from his decision there is no appeal.

2. This matter is *res adjudicata*, and having been once judicially passed upon by the magistrate, it cannot afterwards be disturbed. *Kellogg, ex parte*, 6 Vt. 509. *Kelley* v. *Paris*, 10 Vt. 261. *Ross* v. *Fuller et al.*, 12 Vt. 265.

3. There is no error in the charge. It is settled law, that when an officer keeps within the authority given him by virtue of his office, his official return is *prima facie* evidence in his favor of the correctness of the return. *Stanton* v. *Hodges*, 6 Vt. 64. *Hathway* v. *Goodrich*, 5 Vt. 65. *Barrett* v. *Copeland*, 18 Vt. 67.

The said Walter was treasurer of the town, and the defendant called upon him as an officer of said town, to pay the execution for said town; he refused, and this was a sufficient demand, if made twelve days before the levy of the execution. It is made

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the duty of an officer, having an execution against an individual, to repair to the dwelling house of the debtor before levying the execution; yet if the debtor is not at home, a demand at his dwelling house is sufficient. 3 Vt. 394. 4 Vt. 191.

By the Court. We see no good reason why the authority issuing a writ of execution, may not authorize some one specially to serve the same, when it is against a town, as if it were against a natural person. It is well settled, that in regard to justice process, there is no difference in this respect between *mesne* and final process, and the statute certainly makes no difference between towns and other debtors; and we could not feel justified in making any such distinction. If one had been intended, we entertain no doubt it would have been indicated in the statute. The authorization seems originally to have been perfect, and may be spelled out now, although the paper is somewhat worn.

We think the demand made upon the very person who was treasurer, and his utter refusal, although, as he said, in a peculiar sense, is sufficient.

We are inclined to think, that the omission of the officer to make demand in a case like the present, would not subject him to an action of trespass, but only to such damages as the town might sustain, to be recovered in an action on the case, as has often been held, in regard to other debtors. Judgment affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

FIRST JUDICIAL CIRCUIT.

JULY TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

L. & M. HARRINGTON *v.* EZRA EDSON.

Book Account. Facts found by the auditor and county court conclusive.

A question of fact decided by the auditor, and ultimately by the county court, cannot be revised by the supreme court, unless they find that there was no testimony tending to prove the fact.

BOOK ACCOUNT. Judgment to account was rendered in the county court, and an auditor was appointed, who reported, substantially as follows:—

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No item on the *debit* side of the plaintiffs account, was disputed by the defendant.

The defendant offered no account, but urged, in defense,—1. That the plaintiffs' whole account had been settled and paid, in a settlement made by the defendant with Lyman Harrington, one of the plaintiffs. 2. The statute of limitations.

The auditor found that said account had not been settled and paid, as claimed by the defendant. As to the second ground of defense, the auditor found that the said account is barred by the statute of limitations, unless saved by a credit of "May 3, 1842, "cash, $20," the writ being dated April 27th, 1848.

That as to the said item of credit, there was no testimony to establish it, except the entry upon the plaintiffs' journal of account, which stands posted upon their ledger, and the testimony of Moses Harrington, one of the plaintiffs. He testified that the entry was in his own hand-writing; that he had no recollection of the payment of the money, or of the fact of making the entry, except that he found such entry upon the journal, but from that circumstance, he had no doubt but the money was paid as credited, and that he should not have made the entry without payment of the money, &c.

The auditor found that the entry was made in the hand-writing of the said Moses Harrington, and made at the foot of a page of the journal, under the date of "May 3, 1842," and was the last item posted upon the ledger. That there was, also, in the hand-writing of the said Moses Harrington, a credit to the defendant at the foot of the journal, under date of "April 11, 1842, cash, $20." That this was not posted or post marked; the other entries upon the journal, as far as examined, had a post mark, or mark of payment.

That the entries upon the journal appeared to be made in the regular course of business, the two items of credit above mentioned not excepted, and so of the ledger, excepting the omission to post the credit of "April 11, 1842." That the books were kept, and entries made generally, by clerks in the store.

That in the said journal there were blank spaces, at the foot of many pages, affording sufficient and convenient room for the entry of such credits as those above named. There was no evidence of the payment of the $20, on the 11th day of April, 1842, except

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the entry upon the journal, as above stated. The auditor allowed the said $20, as a credit to the defendant.

That the defendant denied, that he made the payments credited as of April 11, 1842, and May 3, 1842. That it appeared, that on the morning of the second of May, 1842, defendant left Manchester, where both parties then resided, and went to Benson, a distance of about fifty miles, and did not return again to Manchester until Thursday, the fifth day of May, and did not meet either of the plaintiffs during that time.

The county court, June term, 1851,— PIERPOINT, J., presiding, rendered judgment, upon the report, for the plaintiffs. Exceptions by defendant.

D. Roberts for defendant.

The *debit* side of the plaintiffs account is, upon its face, barred by the statute of limitations.

If saved from the statute, it is so only by force of the credit of May 3, 1842. The *onus* of establishing this credit, lays upon the plaintiffs, for,— 1. The credit was the plaintiffs act. 2. The defendant, upon his oath, denied the payment.

To meet the objection of the statute, it was necessary for the plaintiffs to have proved not only the fact of a payment of $20, at some time, but that such payment was made *after April* 27, 1842. The auditor has found the fact of payment, and that such payment was made not after the morning of May 2, 1842, but "just before," and within six years, &c.,— i. e. on one of the three last days of April, the 1st day of May, or at peep of dawn of the 2d day of May, 1842.

Was the auditor warranted in so finding?

1. There was *no* evidence, aside from the book, of the fact of payment, or of the date of the making of the entry.

2. The report falsifies the book as to the date of the payment; and being so falsified, the conclusion of the auditor is but a *guess*, as to the true date, without any legal evidence thereof.

3. The book was suspicious in appearance,— the two entries of April 11, 1842, and May 3, 1842, each for "cash, $20," and each at the foot of a page of the journal, the journal affording occasional blanks at the foot of pages, convenient for such entries,— the first credit not posted, and the entry accounted for by its ne-

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cessity to save the first suit,— the last entry, whether as a duplicate of the first, or as an independent item, accounted for by its necessity to save the last suit.

A book, so suspicious in appearance, so falsified by the proof, so wholly unsupported by other evidence, but flatly contradicted, is not competent evidence of payment, or time of payment. 1 Cow. & Hills' Notes 682–3, 695, 698–9. Swift's Ev. 81, 2, 4. *Eastman* v. *Moulton*, 3 N. H. 156.

But if the book was evidence of payment of $20, at *some* time, the date of the credit being falsified by the proof, there was *no* evidence of the true date, so that the finding of the auditor was but a *guess*, warranted by no evidence. *Cawley* v. *Funell et al.*, 6 Eng. Rep. 397.

Again, there was no evidence showing at what time the entry was made. It might as well have been made at one time as another; and so does not appear to have been an entry against the plaintiffs' interest to make, but the contrary, and so is not evidence *per se*. 1 Cow. & Hills' Notes 154. *Whitney* v. *Bigelow*, 4 Pick. 110. *Raseboom* v. *Billington*, 17 Johns. 182. *Rose* v. *Bryant*, 2 Camp. 321. Phil. Ev. 117.

J. L. Stark for plaintiffs.

It is a well established principle of law, that in mutual accounts each new item of credit takes the whole account out of the statute. *Abbot* v. *Keith*, 11 Vt. 525.

In the present case, the auditor finds the fact, that within six years next preceding the commencement of this suit, the defendant paid on this account, the sum of $20, and that the account is not barred by the statute of limitations. This fact, found by the auditor from evidence, is not to be revised by this, or any other tribunal. *Kent* v. *Hancock*, 13 Vt. 514.

If an auditor decides a question of fact, and it appears from his report, that there was testimony tending to prove the fact as found, his decision is conclusive. *Hodges* v. *Hasford*, 17 Vt. 615. *Cottrill* v. *Vanduzen et al.*, 22 Vt. 514.

It was competent for the plaintiffs to testify to the fact of a payment, made within six years, by the defendant, and this fact found by his testimony, he may have the benefit of, to avoid the statute of limitations. *Sargeant* v. *Sunderland*, 21 Vt. 284. *Hapgood* v. *Southgate*, 21 Vt. 584.

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The opinion of the court was delivered by

REDFIELD, J. It is undeniable, that the testimony, as detailed in the report of the auditor, is calculated to make a very considerable impression upon the mind, that there may be some mistake in regard to the credits of $20, on the two occasions, or whether, in fact, either of them were ever made. These considerations were very ingeniously presented to us, at the hearing, and it seems to us difficult to altogether resist the doubts, which they are calculated to raise.

But this is altogether a question of fact, in the first instance, to be decided by the auditor, and ultimately by the county court. And having been passed upon by both of these tribunals, it is impossible for this court to waive the determination, unless we could say that there was no testimony tending to prove the credit, which was relied upon to take the case out of the operation of the statute of limitations.

This, we think, cannot be fairly argued. The entry in the book, with the suppletory oath of the party, is the ordinary evidence in such cases. And the fact, that the witness has no continuing recollection of the payment, is of no importance. It is the original correctness of the entry which constitutes the evidence, unless something suspicious appears upon its face, which would seem to require explanation.

And even if the position of the entries, "at the foot of the page," could be regarded as suspicious, it is a matter to be judged of altogether by the triers of the fact. So, too, of the force of the attempted *alibi*. Upon the whole, we think the case must be regarded as settled, by the decision of the county court, and that judgment is affirmed.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

SECOND JUDICIAL CIRCUIT.

SEPTEMBER TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

JONATHAN A. POPE *v.* HYREN HENRY AND OTHERS.

Deeds. Parol license. Co-tenants. Statute of limitations. Grantor and grantee.

The registry of a defective deed is constructive notice to no one.

Where one, in faith of a license, enters and occupies for more than fifteen years, as his own, this will give him an equity against the whole world, to be reimbursed for the value of his erections, to the person taking them, before he could be deprived of them.

Possessions taken under a license to occupy permanently, either absolutely, or upon certain conditions, gives, in equity, a title to the premises, according to the terms of the license.

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And the party being in possession under the license, is notice to a subsequent purchaser, or incumbrancer of whatever title, the one in possession may have, whether legal or equitable.

The going into possession of land, under a parol gift, and remaining quietly in possession for fifteen years, gives good title, by the mere acquiescence of the donor or owner, whoever he may be.

A partition between co-tenants, made and acquiesced in for more than fifteen years, becomes absolutely perfect at law, and if it were not so, a court of equity would decree its perfection.

Any title subsequently acquired, by the grantor, who conveys by warranty, will inure to the benefit of the grantee. But grants made by the grantor, or conditions, or limitations, or estoppels subsequently attempted to be annexed to the estate, will not affect his grantee.

APPEAL from the court of chancery. The court of chancery decreed that the bill be dismissed, and that the defendants therein, respectively recover their costs. From this decree the orator appealed.

Bill alledges the indebtedness of the Gneiss Bottom Manufacturing Company, to the assignors of the orator, and that said Company executed to them, a mortgage of certain land in Weathersfield, on the 22d day of September, 1829; the company name altered to the Perkinsville Manufacturing Company; the estate conveyed by the guardian of certain infants, to the company, and by them mortgaged back to secure certain sums of money, as aforesaid.

That on the 14th day of September, 1836, the Perkinsville Manufacturing Company, being indebted to Daniel Denney and George D. Dutton, in a certain account, executed a note, and mortgaged land to secure the same. Dutton conveyed to Denney, and Denney purchased the mortgage to said guardian,—on the 18th of January, 1842, took an assignment of the same. That said Denney brought a bill, setting forth the same mortgages herein before set forth, and praying foreclosure upon them, and obtained a decree, November term, 1842, for over $13,000, and interest and costs to be paid by the first day of February, thereafter, which became absolute; and Denney, for $6,600, conveyed the premises to the orator.

Alledging that defendants all claim an interest in the premises, by liens accruing subsequent to orator's title.

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Answer of Hyren Henry.—Admits the organization and the alteration of the name of the company, and that the land had been conveyed to the company by James H. Perkins, guardian, and does not know in regard to the indebtedness; denies the proper execution of the deed by the company,—is not properly drawn; Daniel Denney claimed some title, but what, does not know; knows nothing of the company being indebted to Denney & Dutton, or of the mortgage; denies the proper execution of the deed, as that of the company, or of the president; refers to the deed of assignment to the orator; admits the forclosure without appearance.

The company owned the premises described, and that a high bank on the west side of the river was wearing away, and they agreed with defendant, early in 1832, if he would erect a suitable bank-wall to protect said bank, he might have the right of using and conveying the waste water to his own building, and they would convey to him the title to the same; and that he did the work in faith of such title; and has been to great expense and trouble in the premises; and has erected a building for the purpose of using the waste water; and has used the aqueduct ever since; and had no doubt they had the right to convey it to him; a public highway is now laid over this, defendant's aqueduct; the stock of the company, subsequent to 1832, and prior to 1839, was conveyed to other stockholders than those who owned it at the time of the making of the aqueduct; that they claimed rent of him, and he took, under protest, a perpetual lease of the same, at the yearly rent of twelve dollars, which lease was recorded in March, 1839; and he quit-claimed all his title to the premises.

The answer of L. Cheney.—Does not claim any interest in any portion of the premises, except a certain piece by metes and bounds; one Edmun Durrin had owned one portion of the premises described, and the Perkinsville Manufacturing Company owned the other half; Durrin conveyed his portion to one Dunbar & Haven.

That in September, 1832, the company properly authorized their president, to convey to Dunbar & Haven, a certain piece of land, (twenty-six rods of land,) and the deed was properly executed,—consideration, one hundred dollars, and believes the consideration was the conveyance to the company of their interest in another portion of the premises; the 18th of March, 1834, Haven released his right to Dunbar; Dunbar built a house, and conveyed it to

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this defendant for $800.00 consideration, to secure the payment of a certain note, and that note still unpaid; and these lands included in the mortgages set forth in plaintiff's bill; and claims that the mortgages so set forth, were not properly executed.

Answer of Lucretia Stone.— Does not claim any interest in the land, except a certain portion described by metes and bounds Buckminster White was the owner of one undivided half of the premises, the 30th day of March, 1830, and on that day, he and the company, the other co-tenant, made a division or separation, and executed mutual releases; White conveyed to one Nelson Grout, and Grout conveyed to one Ezekiel Cram; and says there was no deed on record conveying these lands to either of these companies; the guardian, or Perkins' heirs' deed was not put on record until the 14th day of June, 1832, long after the purchase of those under whom this defendant claims; Cram took immediate possession, and so continued in possession until he sold and deeded to Robert B. Cram; Robert B. Cram then took possession, and so continued until 1842; and this defendant furnished the money to pay for these premises, and took security by way of mortgage upon the premises, conditioned for defendant's support; and denies all knowledge of the mortgage, or of any claim in the Perkinsville Manufacturing Company; her mortgage foreclosed, and is older and better than plaintiff's claim, and plaintiff's title is wholly informal and inoperative.

Most of the evidence in the case, consists of admissions, by the parties, taken down by the master. It appeared, that the first mortgage set forth in the orator's bill, dated the 22d day of September, 1829, was not executed in conformity with the statute then in force. The second mortgage, dated the 14th day of September, 1836, purported to have been executed by vote of the directors, and recites no vote of the corporation. And it also appeared, that the second mortgage was subsequent in time, to the accruing of the several titles of the defendants. The facts decisive of the case, sufficiently appear in the opinion of the court.

H. E. Stoughton and *E. Hutchinson* for orator.

Washburn & Marsh for defendant Henry.

W. M. Pingrey for defendants Stone and Cheney.

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This case was heard, at the regular March Term, in Windsor county, and held under consideration, until the present time.

The opinion of the court was delivered by

REDFIELD, J. This is a bill brought in favor of a second assignee, (after one foreclosure,) to foreclose two certain mortgages against certain persons, not included in the former bill and decree. A very great number of important questions are raised upon both sides, which the court have not deemed it important to consider, there being other questions, which are decisive of the rights of the parties.

The first mortgage, which dates as far back as September, 1829, not having been executed, according to the statute then in force, as is obvious, and admitted on all hands, was not entitled to registry, and by consequence was not constructive notice to the defendants. *Isham Admr.* v. *Bennington Iron Co.*, 19 Vt. 230.

The second mortgage is subsequent in time, to the accruing of the several titles of the defendants, bearing date in 1836. But this deed, as it was executed in pursuance of a vote of the directors only, and not of any vote of the corporation itself, it would seem questionable how far it can be made to come up to the requisitions of the statute then in force.

Without saying more, in regard to the title of the plaintiff, we proceed to an examination of the title of the several defendants, each of which stands upon peculiar grounds.

In regard to that of defendant Henry, it originated in a mere license to take water, by some kind of duct, sufficient to carry certain machinery, which in faith of the license he subsequently erected, and had continued to occupy as his own, for more than fifteen years before the bringing of the bill. This we think gives him an equity against all the world, to be reimbursed for the value of his erections, to the person taking them, before he could be deprived of them. It is one of the first principles of the Roman civil law, in regard to the title of real estate and valuable erections, and meliorations, as they were called, put thereon by the occupier, in faith of a title, which subsequently failed for any cause, that one thus benefitted by the labor of another, should make reasonable compensation.

And this same principle has been very early incorporated into the English chancery law. This right clearly exists in Henry, without regard to his ultimate title.

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A very thorough discussion of this whole subject, which would be out of place here, will be found in the 2 Vol. American Jurist, p. 294–314.

But we think the title of Henry, according to the terms of the original contract, whatever it was, unless abandoned by the lease, which he accepted in 1839, must be considered good upon two grounds.

1. Possession taken under a license to occupy permanently either absolutely or upon certain conditions, gives in equity, a title to the premises, according to the terms of the license. And this contract being partly performed, or fully performed on one part, by permanent erections of considerable value, a court of equity will decree an assurance of the title stipulated.

And the party being in possession under the license, is notice to a subsequent purchaser or incumbrancer, of whatever title the one in possession may have, whether legal or equitable.

2. So too, one going into the possession of land under a parol gift, and remaining quietly in possession for fifteen years, acquires good title by the mere acquiescence of the donor or owner, whoever he may be. And the possession is regarded as quiet, unless interrupted by a forcible ouster, or legal proceedings for that purpose. These propositions are sufficiently established and explained in *Hall* v. *Chaffee*, 13 Vt. 150. *Rublee* v. *Mead*, 2 Vt. 544.

3. The accepting of a lease of the corporation, at a date subsequent to the mortgage of 1836, if that is to be regarded as a properly registered mortgage, (which is certainly very questionable,) it has been urged would so merge the prior equity of Henry, as to postpone it to the mortgage. But it seems to us, this is giving the mergee an effect which the parties did not contemplate, and which is clearly at variance with their equitable rights. And such effect will not be allowed to follow from a mergee of title, unless it becomes absolutely indispensable. Thus it has often been decided, that taking a release of the equity of redemption by the first mortgagor, will not so merge the first mortgage, as to postpone it to a subsequent mortgage. This lease, in strictness must be regarded as having superseded the license, but we think it ought to be regarded, as merely a further assurance of title, like the perfecting of a defective conveyance, and that the title in equity must be re-

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garded as taking date from the time of the entry, the same as if Henry had resorted to a court of equity to perfect his title, instead of effecting it by arrangement with the party. If this conveyance had been decreed, it would have been so regarded, although in fact, made after the date of an intervening incumbrance.

The title of Cheney and Mrs. Stone, it seems to us, stand substantially, upon the same legal basis.

There was an attempt at partition, between the co-tenants, more than fifteen years before the institution of this suit. The conveyance of the co-tenants, under whom these defendants derived title, was formal and valid, and the company have availed themselves of that portion of the premises, and it has gone for their benefit, and upon these same mortgages, it would seem.

And during all this long time of more than the term of the statute of limitations, the company and the mortgagees have acquiesced in this partition. And in faith of it, the defendants, and those under whom they claim, have, from time to time, continued to make valuable erections.

Under these circumstances, a court of equity would not lend its aid to the company, to foreclose the title of the co-tenants, or to the mortgagees to do it by reason of any defect in their conveyances, by which they hold, even if the title had not become perfected, by lapse of time, unless they first procured a release of the title acquired by the conveyance to them, and also offered to reimburse the expense incurred in improvements, nothing of which is done in the present case.

And in addition to all this, it seems to us very clear, that this partition having been acquiesced in for more than fifteen years, has become absolutely perfect at law, and if it were not so, a court of equity would decree its perfection.

In every view we have been able to take of this case, it seems to us to stand upon no sufficient grounds of equity, and the decree of the chancellor dismissing the bill with costs, as to all the defendants, is affirmed.

The vote of the company to make partition with Dunbar & Haven, as recited in the deed of Bond, the president is the first day of September, 1832, although the deed was not actually executed until the 30th day of September, 1833. Still it must be regarded as an acquiescence in the partition from the date of the vote.

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Mrs. Stone's mortgage is dated as early as December, 1832, and the land had been occupied for many years before in severalty, claiming an absolute title, against the world. This is a sufficient ouster of a co-tenant even. And during all this time there has been an acquiescence in a partition in fact.

The deed to Robert Cram, dated in 1839, if accepted by him, could not affect the prior title by the mortgage deed in Mrs. Stone. The grantee is affected by all existing estoppels in the deed, the same as his grantor would be at that time. And especially is this true of deeds upon the registry.

But it is no more competent for the grantor to affect his grantee by estoppels subsequently created, than by deeds of the same land to others, by the same grantor. Any title subsequently acquired, by the grantor, who conveys by warranty, will inure to the benefit of the grantee. But grants made by the grantor, or conditions, or limitations, or estoppels subsequently attempted to be annexed to the estate, will not affect his grantee.

Emory Burpee *v.* Pliny Parker, Benjamin Billings, and Darius L. Green.

[In Chancery.]

Mortgage. Foreclosure.

A mortgagee may legally hold two mortgages, on different pieces of land, for the security of the same debt, and may foreclose his mortgage on one piece, without the other; and whether a foreclosure on one, will bar a foreclosure on the other, depends upon the value of the premises foreclosed.

If the land foreclosed is equal in value to the debt, the debt is thereby paid, and the remaining premises are relieved from any further claim as security.

Appeal from the Court of Chancery.

The orator filed his bill to foreclose a mortgage on certain premises in Ludlow, executed to the orator by the defendant Parker, December 7, 1841. The condition to the mortgage was as follows:

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"The condition of this deed is such, that if the above named "Pliny Parker and one Benjamin Billings, shall well, truly, and "faithfully release, indemnify, and save harmless, the said Emory "Burpee from all suits, damages, and costs, that may arise by rea- "son of the said Burpee's having signed any note, draft, or order, "for the benefit of said Parker & Billings, or by reason of the "said Burpee's hereafter signing any note, draft, or order, for their "benefit, then this deed to be void otherwise of force."

The orator alledged in his bill, that he had signed various notes to various persons, for the benefit of said Parker & Billings, and had paid the same, among which was a note to Black River Bank, a note to Isaac P. Strow, and two notes to Martin Perry.

The defendants admitted by their answers, that the note given to the bank was for their benefit, and was secured by the mortgage; that the note given to Strow was for their benefit, but insisted it was not secured by the mortgage, or intended to be so secured, for that the said Parker executed a deed to the orator, of a lot of land, called the David Sargent lot, to secure him for signing said Strow note, and that the defendants had no knowledge of the other notes, and that no part of the money obtained thereon, ever came to their use.

The orator traversed the answers, and testimony was taken, from which it appeared, that Parker & Billings rented a factory belonging to the orator, and were considerably in arrear for the rent; and, that April 1st, 1846, they executed a note to the orator of $1,082.60, for the rent, and that no part of the money obtained on said notes, was applied to the extinguishment of the orator's claim; that said Strow note was secured by a deed of said Sargent lot, and that the defendant Billings was present when said notes were executed to Perry, and said they were for the benefit of Parker & Billings. It also appeared, that the orator had the money obtained on said notes to Perry, and the reason why he thus obtained it, was because said Parker & Billings neglected to pay said rent.

The only interest the other defendant, Green, had in the transaction, was, as mortgagee of the premises, subsequent to the orator.

The chancellor decided, that the bank note and the Strow note were secured by the mortgage, and the other notes were not; from which the orator appealed.

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Washburn & Marsh for the orator.

It is conceded that the bank note was given for the benefit of Parker & Billings, and that they had the money thereon realized, and that the orator paid it before the commencement of this suit.

It is also admitted in the answers, that the money realized on the Strow note was received by Parker & Billings, and it is proved that the orator paid it.

The mortgage *in terms*, applies to this very note.

As to the notes given by the orator for money borrowed, and signed by him alone, the orator claims they were executed solely for the benefit of Parker & Billings, and at their request, and upon their promise to pay them when they become due, and that he has been compelled to pay them; and that, therefore, he has a valid claim under the mortgage, to recover the money so paid by him, to the extent of the indebtedness of Parker & Billings to him, ($1,082.60.)

When the orator received the money borrowed by him, it was as payment of so much of the debt of Parker & Billings to him, if they met the notes so given for the money. And so far as the mortgage security is concerned, it was in fact payment, creating a claim for indemnity under the mortgage, if he was compelled to repay. *McDaniel* v. *Colvin et al.*, 16 Vt. 300.

S. Fullam for defendants.

The defendants insist that the note to Strow was not secured by this mortgage.

1. Because it was given prior to this mortgage, and was not intended to be secured by it.

2. It was amply secured by a deed of the Sargent lot.

The orator should have included the Sargent lot in his bill, so that it might be redeemed.

This mortgage only secures the bank note. The other notes described in the bill, were given for the orator's benefit, were not reckoned in the settlement, and in no way benefitted the defendants.

The obvious and palpable meaning of the mortgage is, to secure the orator for undersigning for Parker & Billings, and if the rent of the factory was intended to be secured, it would have been named.

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Billings should be discharged with his costs. He had no interest in the premises, and never had, he therefore had no interest to redeem.

Billings admissions are not evidence against the other defendants,— he has no interest in the controversy, and his admissions should not affect those who have.

The opinion of the court was delivered by

Isham, J. The condition of the mortgage deed described in the orator's bill, is evidently sufficiently broad and general in its provisions to embrace the note given to Isaac T. Strow, in February, 1845. This note, it appears, was given in substitution of the note executed by the same parties to Archibald McEwing, in November, 1839.

The circumstance that the David Sargent lot was conveyed by Parker to the complainant, as security for signing the original note to McEwing, and that he still retains the same for that purpose, does not affect the right of the complainant under this mortgage, as both tracts of land may be held under different instruments, as security for the same debt, and whether a foreclosure of one will bar a foreclosure on the other, depends upon the value of the premises foreclosed. If the land foreclosed is equal in value to the debt, the debt is thereby paid, and the remaining premises are relieved from any further claim as security. 3 Mass. Rep. 562. 3 Mason's Rep. 474. 8 Pick. Rep. 336. 11 Wend. Rep. 106. 2 Greenl. Evid. § 524.

It was not necessary to include the Sargent lot in the bill, as the complainant is at liberty to proceed against the premises described in the last mortgage only, and on payment of the debt, the mortgagor has his remedy by a bill in his own name, for a reconveyance, or a decree to that effect could have been made in this suit, if a cross bill had been filed for that purpose.

The claim on the note to the Black River Bank, is not objected to by counsel, and is consequently allowed on this mortgage. Both of these claims, being numbers 13 and 14 in the schedule, were allowed by the chancellor, but for the rejection of other claims made by the complainant, he has taken this appeal. It is evident, from the general language of the condition in the mortgage deed, that the object of this mortgage was, to secure the complainant in

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giving them the use of his name and credit from time to time, as their necessities required, in raising money for the prosecution of their business. And when we give effect to the mortgage in securing future claims, it is equally evident that the testimony should as clearly bring them within the conditions of the deed, as would be required on those claims existing previous to the execution of the mortgage. Where the notes so given were signed by Parker & Billings, and undersigned by the complainant, the case is free from difficulty, for the note carries on its face evidence of their request for his signature, and that the benefit derived, was of that character contemplated by the parties in the execution of the mortgage. Where the complainant has not undersigned their names, but has given his individual note for money borrowed, more difficulty arises, as the note furnishes no evidence of its having been given at their request, or for their benefit, and those facts are supplied by testimony *aliunde*. If Parker & Billings had raised money on the individual note of the complainant, unquestionably the complainant would be secured under this mortgage, even if the money had been paid on the debt of the complainant. For in such case, *the acts* of Parker & Billings would supply the proof of request in giving the note, and show that the benefit derived from such payment, was of that character contemplated when the mortgage was executed.

Where, however, the complainant has executed his own note to other persons for borrowed money, and which he personally negotiated and received, we derive no such evidence from the face of the note, or from the acts of Parker & Billings, and such are the facts in relation to the various claims in the schedule, from number 2 to 11 inclusive, except the Martin Perry notes, numbered 7 and 8. In all these cases the complainant gave his own note, negotiated for the money, and received the amount, and has made no application of it on any debt of Parker & Billings. To make the payment of those notes by the complainant, a claim under that mortgage, it must appear that they were the notes of Parker & Billings to pay, and that they were under obligations to indemnify, or save harmless, the complainant for having given the same. This obligation would arise if the money had been paid into the hands of Parker & Billings, or if it had been applied by their mutual consent, on the note given, or claim for rent, and which is referred to by number 15 in the schedule.

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The complainant insists that such is the case in relation to these notes. That the money was borrowed by their direction, and when received, it was as payment on the note given for rent. This is denied by the several answers of Parker & Billings. They admit their indebtedness on that note for rent, and that they had been called upon for payment, but state that they informed him of their inability to pay at that time; that he must raise the money he wanted elsewhere, as he was able to borrow and they were not, and they would let him have the money when necessary to repay it. This answer, though traversed, is responsive to the bill, so much so, as to require it to be overcome by competent and sufficient testimony to entitle the orator to a decree. If the facts stated in the answer are true, it is clear that Parker & Billings were under no obligations to pay these notes as their own; they were simply under obligations to furnish the means to the complainant, in payment of their note, to enable him to pay the money borrowed, and the payments, when so made, would no more constitute a claim under this mortgage, than the note itself given for the rent.

In examining the testimony of the several witnesses that have been introduced by the orator, in which they have related the substance of several conversations between the orator and the defendant Billings, it is proper to observe, that whilst its tendency is to show the main facts, as claimed by the orator, yet the testimony is not greatly inconsistent with the case, as stated by the defendants in their answers, when Billings stated, (as testified by Mr. Benton and others,) that they had frequently told the orator *to borrow money*, and that they would *meet*, or *pay it;* it is not the exercise of great latitude in the construction of testimony, to indulge the idea that reference may have been had, to *their promise* to pay a sufficient amount on their note to the orator, to enable him to pay those notes, and in *that way to pay or meet* the claims.

It may be as reasonable so to weigh the testimony, as to regard those and similar expressions, as a full recognition of those notes as their own, and against which they were bound to indemnify the orator. But wherever may be the balance of testimony, as it stands connected with the witnesses introduced, there are other circumstances in the case that do, and should, exert a controlling influence upon the question in relation to these particular notes. The claim of the orator for rent, had been accruing for the period

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of seven years, and was finally adjusted, and a note given for the balance in the spring of 1846. By reference to the schedule, it will be perceived that all these notes were given, and the money received thereon by the orator, previous to that settlement, and that the money was borrowed in consequence of his inability to obtain payment of his rent. And yet, in that settlement for rent, no statement is made by the orator of the money borrowed, no credit given, and no deduction from the amount due for rent, made on account of it, but a note was taken in that settlement for the rent due. If the orator intended to make those notes the debts of Parker & Billings, and place them under an obligation to save him harmless from the payment of them, it was his duty to have then applied the money received on the notes, on the rent, and have taken their note only for the balance, or by mutual consent have indorsed that amount on the note. The money would then have been applied for the benefit of Parker & Billings, and the notes would have been theirs to pay. But the neglect of the orator so to apply the money, or account for the same, was a direct repudiation of their right to treat the same as payment on that claim. He has treated the notes and the money received thereon as his own, and with which Parker & Billings had no concern; it is evident, also, Parker & Billings so considered it, for they were directly interested to insist upon the application of that money on the rent, if the money had been borrowed on their account. And if the notes were for them to pay, it is not reasonable to suppose that they would have given their note for the amount of rent due, if they were entitled to have that application made, and leave unaccounted for in any place the money so raised. It is true Parker & Billings were benefitted in the orator's borrowing this money for his use, and in his not insisting upon immediate payment of the note against them, as they were to that extent permitted to retain their actual capital in the prosecution of their business. But it was that benefit only which every debtor derives from an extension of credit on his debts.

They were equally benefitted when the note for rent was given, as the orator might then have insisted upon immediate payment of that amount, and extracted so much from their actual capital employed; but by giving this note, they were permitted to retain it in their business, yet no one has considered that note as secured

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by this mortgage. In relation to those claims, therefore, we think they were properly disallowed by the chancellor. The same considerations apply in relation to the note given to the Bellows Falls Bank, being number 12 in the schedule. The note, also, purports on its face to have been given by the orator as principal, as he was the first signer. The defendants Parker & Billings, state, that they signed the note as sureties, and the testimony, particularly of Charles Burpee, is far from overcoming the answer, and the evidence arising from the face of the note, in showing this to be the note of Parker & Billings to pay.

In relation to the notes given to Martin Perry, being numbers 7 and 8 in the schedule, though given before the settlement in the spring of 1846, yet, it would appear from the testimony of Mr. Perry, that the money was not received by the orator, and had no connection with their indebtedness for rent, but on the contrary, the first note was borrowed for Parker & Billings, to enable them to pay a bank note. There was not, therefore, the same reason for accounting for the money on the settlement for rent, that existed in relation to the other notes, where the money was received and retained by him. Perry testifies distinctly, that Billings was present when the money was borrowed in the one case and paid in the other, and not only from their declarations in conversation, but from the conduct and interest which Billings took in the transaction, he was informed and received the impression, that the money was obtained for them, and had been appropriated for their benefit.

We are, therefore, inclined to the opinion, that these two notes should be added to those allowed by the chancellor, under this mortgage.

The result is, that the decree of the chancellor must be reversed, and the case remanded for the purpose of adding those two notes, and including them in a decree for the orator.

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JOB LYMAN *v.* WINDSOR, WEST WINDSOR, AND EDWIN EDGERTON.

[This case was heard, March term, 1852, in Windsor County.]

Town Clerks,— their official duty. Liability of towns for the default of their Town Clerks. Misjoinder.

Where the plaintiff, in an action against the town and town clerk, for a breach of official duty on the part of the town clerk, set forth in his declaration, the averments, in substance, that the town clerk, being inquired of by the plaintiff, at the time of their negotiation, (the said negotiation being with the town clerk for the purchase of certain lands,) whether there was any incumbrance of record upon the land which he was about to purchase, and being requested, if there was, to show the record of it to the plaintiff, neglected and refused to show the record, and did not disclose the fact that such incumbrance existed, but concealed the same. The inquiring and request of the plaintiff, being alledged to have been addressed to the defendant in his official capacity, and his conduct which ensued, being also alledged in the same character, it was *held*, that the facts alledged are sufficient to entitle the plaintiff to redress under the statute.

And where it was further charged, that although defendant Edgerton knew the plaintiff to be ignorant of the incumbrance, he concealed the fact of its existence, furnishing no clue or guide by which the record of it might be discovered, *held*, that an official neglect and violation of duty are sufficiently alledged. And that the additional averments of this count, that the plaintiff was thus induced to complete his purchase, believing the land to be unincumbered, except by the lease to Dunbar and White, and was consequently obliged to incur a heavy loss by the reason of the previous mortgage to George and Edward Curtis, held that a legal cause of action is here stated, as well against the defendant town, as against the town clerk.

And it was *held*, that the liability of the town, in a case of this description, is equally original and direct as that of their delinquent town clerk or constable. And that no previous recovery or suit against the officer, is necessary in order to perfect a right of action against the town for his default.

The enactment, that the town "shall be liable to make good all damages," &c., is held to render them immediately answerable for the official misconduct or neglect of the officer, to any person sustaining injury thereby. This is neither more nor less than the liability of the officer himself. Both are made liable in the same form of action, and may be subjected upon the same evidence. Hence, a joint action can be sustained against the two parties liable.

ACTION ON THE CASE, for the default of the defendant Edgerton, as town clerk of the former town of Windsor, now Windsor

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and West Windsor. The declaration is in four counts. In each, the following facts are alledged, viz.: That defendant Edgerton, from March, 1835, to March, 1841, was legally chosen and officiated as town clerk of the then town of Windsor, (now Windsor and West Windsor.) That June 10, 1835, he, with his wife, executed a mortgage of certain lands in Windsor, to George and Edward Curtis, conditioned to secure his note to them bearing date the first of May, previous. That said mortgage was lodged with him for record, and was by him, as town clerk, recorded, without making any index or reference to the record, and none existed as long as he continued to be town clerk.

That afterwards, on the 4th day of February, 1839, well knowing that said incumbrance still existed in fact and upon the record, and that there was no such index or reference, and that plaintiff had no knowledge of said incumbrance, but fully believed there was none, sold to the plaintiff, and received pay for the same to the full value of the lands purchased, and by deed of himself and wife, granted and conveyed the same to plaintiff, as being free and clear (as specified in said deed) from all incumbrance, except a certain lease then held by Dunbar & White; and the plaintiff's said deed was duly recorded the 7th day of the same month.

That the plaintiff, at the time of such purchase, did not know of such incumbrance, and never learned of its existence until the bill was served upon him in favor of said George and Edward Curtis, brought to foreclose their mortgage, in October, 1845, at which time said Edgerton had become and has ever since remained wholly insolvent; and that the plaintiff would not have made said purchase, had he known of said incumbrance.

That said George and Edward Curtis pursued their said bill, and in May, 1849, obtained a final decree against plaintiff and others, and that plaintiff has had to pay a large sum to redeem his lands from said incumbrance. That he has thereby suffered damages, &c.

The allegations of Edgerton's duty, as town clerk, and of breaches in the first and second counts, are, in substance, as follows:—

1st Count. *Duty:* (1.) To have made and kept open to inspection, such an index or reference to the record of the mortgage: (2.) Or to have disclosed the existence of the incumbrance to plaintiff, at the time of his purchase.

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Breach, That he did neither.

2D COUNT. *Duty:* (1.) To have made and kept, such an index or reference: (2.) And, at the time of negotiating said trade with plaintiff, on proper request, to have shown to plaintiff the record of the mortgage: (3.) Or, upon inquiry relative to incumbrances, made by plaintiff, of said Edgerton, at the time of negotiating the trade, to have *in some way* disclosed to the plaintiff, the fact of the incumbrance.

Breaches. (1.) That he made and kept no index, &c. (2.) That, although said Edgerton was inquired of by plaintiff, whether there was any incumbrance of record, at the time of negotiating; and at same time plaintiff requested him, if there was any such record of incumbrance, to show plaintiff the record; yet said Edgerton did not show the record, or disclose the fact of the incumbrance.

General demurrer to the declaration. The county court, May term, 1851,— PIERPOINT, J., presiding, upon said demurrer, rendered judgment that the declaration is insufficient by reason of the misjoinder of said Edgerton, as party defendant, with said towns. Exceptions by plaintiff.

E. Hutchinson, Tracy, Converse & Barrett for plaintiff.

1. The plaintiff insists there was no misjoinder. If a suit would lie against either defendant, if sued alone, it can be sustained against them jointly.

Towns are made liable for the neglects or defaults of their town clerks, &c. Slade's Ed. Stat. 420, § 2. Revi. Stat. 89, § 27.

That a suit could be sustained aginst either the town or the clerk, will not be denied.

If against either, then surely against both, separately, at the same time.

If against both, separately, then why not against them jointly?

The very evidence which would make one liable, would make the other also. What would excuse one, would excuse the other also.

The same allegations necessary to raise the liability of one, would make the other liable also.

Their liability is inseparable.

There are cases, when it is said the master and servant cannot be joined. But in such cases, the master is either not liable at all,

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or in a different form of action from what is applicable to the servant. If the master directs or encourages the servant to commit an act of trespass, or assents to it, they are both liable in trespass, and may be joined.

Now if the master and servant do any act, or are guilty of neglect, which would make them liable in *case*, is there any less reason for joining them?

The true rule seems to be, where the same form of action, sustained by the same proof, will lie against two or more, they may be joined as defendants.

In *Wright* v. *Wilcox*, 19 Wend. 345, COWEN, J., says, "Whether the principal and inferior may be charged jointly, depends "on a trespasser *vi et armis*, or in case only. If the latter, they "may be sued jointly," &c.

The same rule is laid down in Hammond on Parties, 95, 96 and 97. Also in *Brown* v. *Lent*, 20 Vt. 529, see opinion by DAVIS, J., p. 531.

In *Moreton* v. *Harden et al.*, 10 C. L. R. 316, where one of the proprietors of a stage coach was driving, and ran against plaintiff's cart, it was held, that an action on the case for negligence would lie against all three. It being objected that trespass was the proper action against the driver, BAILEY, J., said, "It is a sufficient answer to say, that the plaintiff had a right to sue all the "defendants, and that trespass clearly could not lie against them "all; such action might perhaps be maintained against the driver, but not against the other defendants." 6 D. & R. 275.

In *Wilson* v. *Peto & Hunter*, 17 C. L. R. 13, which was a case for obstructing lights. Hunter was clerk for Peto in erecting the buildings. Hunter complained, and claimed that he ought not to be joined; but the court *held* them properly joined, as the clerk was present and superintended the work.

There are cases where either tresspass or case will lie. *Waterman* v. *Hall et al.*, 17 Vt. 128. And where there may be such choice of actions against some, and only case against others, they may all be joined in *case*. *Williams* v. *Holland*, 25 C. L. R. 50. 25 C. L. R. 261, same case.

2. The declaration is in other respects sufficient. It was the duty of the town clerk to disclose the true state of the title to the premises.

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Washburn & Marsh for defendants.

1. The declaration is defective, upon demurrer, for the misjoinder of defendants. The action is brought against the town and the town clerk jointly, but if they are each liable, it is for causes of action distinct in their nature, and not for a joint tort. The town clerk is liable, if at all, at common law, for the wilful fraud alledged in the declaration; or, under the statute of 1797, for his neglect of duty. But the town is liable solely by virtue of the statute of 1816, which imposes upon them a liability to make good the damages occasioned by the default of the town clerk. The town have committed no *tort*, and they are only liable to be sued in *case*, because that form of action is prescribed by the statute. The town clerk is charged with a *wilful tort*. Even in the case of master and servant, the master cannot be joined as defendant, for a wilful trespass committed by the servant, and it can make no difference, that the offence is a non-feazance, if the omission be charged as wilful, and with malicious intent, on the part of the servant. As against the town, a further allegation is required than against the town clerk, to wit, that the town is by law responsible for the default of the town clerk. The *act* of the town clerk is not the *act* of the town, as in case of master and servant, but the town is liable to "*make good the damages*" occasioned by the act.

Previous to the statute of 1816, no action could have been sustained against the town, and, of course, the town and town clerk could not have been joined. The statute of 1816 has not changed the rule in this respect, and the defect being apparent upon the face of the declaration, it is fatal upon general demurrer. 1 Chit. Pl. 72, 74. *Campbell* v. *Phelps*, 1 Pick. 62, 16 Vt. 608.

2. The declaration is defective, as against the towns, in omitting to aver that the plaintiff made any examination for the purpose of ascertaining whether the mortgage deed was indexed or not.

The action is *case*, brought to recover the *damages* sustained by the plaintiff by reason of the misconduct of the town clerk. It is essential that *the damages should have been occasioned by such misconduct;* if not so occasioned, the plaintiff cannot complain of the misconduct.

The misconduct alledged was not official, and does not render the town liable. The plaintiff relied solely upon the personal as-

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surance and good faith of Edgerton, and in no respect upon his official position. The inquiries were not made of Edgerton, because he was *then* town clerk, nor did his *then* holding the office enable him more satisfactorily to answer them. The answer would have been the same, and the effect the same, if he had ceased to be town clerk in March, 1836. This deprives the plaintiff of all pretence for saying, that the misconduct was *official*.

3. The omission to index the mortgage, was not the neglect of a duty, on the part of the town clerk, for which the town is responsible.

It was the duty of the town clerk truly to record the mortgage. Sl. Stat. 415, § 20. And it has been decided by this court, in the case of *Curtis* v. *Lyman*, that this requirement was complied with,—that the deed *was truly recorded*.

The opinion of the court was delivered by

Royce, Ch. J. Several of the questions now made in argument, were decided in *Hunter* v. *Windsor and West Windsor*, at the last term. And, treating the points then determined as being settled for this case also, we have at present only to inquire,—1st, whether the alledged injury to the plaintiff, sufficiently appears to have resulted from any breach of official duty on the part of the defendant Edgerton; and 2d, whether there is a misjoinder of defendants.

The first question will be considered in reference only to the second count in the declaration. For, if the allegations in this count are sufficient to determine the question in favor of the plaintiff, it becomes unnecessary to pass upon the sufficiency of the other counts. The averments peculiar to this count, are, in substance, that Edgerton, being inquired of by the plaintiff, at the time of their negotiation, whether there was any incumbrance of record upon the land, which he was about to purchase, and being requested, if there was, to show the record of it to the plaintiff, neglected and refused to show the record, and did not disclose the fact that such incumbrance existed, but concealed the same. Now without relying for any decisive effect in this case, upon the failure of Mr. Edgerton to keep an alphabet or index, pointing to the record of his mortgage to George and Edward Curtis, we think the other facts here alledged sufficient to entitle the plaintiff to redress

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under the statute. The inquiry and request of the plaintiff, are alledged to have been addressed to the defendant Edgerton in his official capacity, and his conduct which ensued, is also alledged in the same character. And such, indeed, is the sense in which the transaction would be more properly understood. The inquiry was, whether there was any such incumbrance of record "in his office," which could mean no other than his office as town clerk; that being the only place in Windsor for such record to be made or kept. And the request was, that he would show the record, if one existed;—a request obviously referring to that official custody and control of the records which would rightfully enable him to exhibit them. Had he complied with the request, it would seem that in so doing he must have acted officially. And since we must suppose Mr. Edgerton to have been fully aware of the incumbrance, and the record of it, (which fact is moreover expressly charged in this count and others,) his neglect and refusal to show the record, upon a request so manifestly timely and reasonable, could be nothing less than a default in official duty, unless he disclosed the existence of the incumbrance, or put the plaintiff in a way to find the record of it by examination. But it is charged, that although he knew the plaintiff to be ignorant of the incumbrance, he concealed the fact of its existence, furnishing no clue or guide by which the record of it might be discovered. We think an official neglect and violation of duty are sufficiently alledged. And as it appears, from the additional averments of this count, that the plaintiff was thus induced to complete his purchase, believing the land to be unincumbered, except by the lease to Dunbar & White, and was consequently obliged to incur a heavy loss, by reason of the previous mortgage to George and Edward Curtis, we consider that a legal cause of action is here stated, as well against the defendant towns as against the town clerk.

It may be premised in reference to the other question, that the liability of the town, in a case of this description, is equally original and direct as that of their delinquent town clerk or constable. No previous recovery or suit against the officer is necessary, in order to perfect a right of action against the town for his default.

The statutory enactment, that the town "shall be liable to make "good all damages," &c., is held to render them immediately answerable for the official misconduct or neglect of the officer, to any

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person sustaining injury thereby. This is neither more nor less than the liability of the officer himself. Both are made liable in the same form of action, and may be subjected upon the same evidence.

Hence, no solid objection is perceived to a joint action against the two parties liable. The person injured cannot be restricted to an action against one only of these parties, and if he seeks his remedy against both, it is not apparent why two actions of the same kind should be required to enforce precisely the same liability. So far as the analogy extends between such a case as the present and those growing out of the relation of master and servant, the views now expressed receive countenance from the tendency of modern authority in the latter cases. The inclination evidently is, to sanction a joint action against the master and servant, for the default of the latter, provided the appropriate form of action against each would be *case*, and not *trespass*.

It is true, that the liability of a town in this class of cases, would not arise upon common law principles. But when it is created by statute, and made to co-exist with that of their officer in the manner before stated, we are disposed to hold that the prescribed action on the case is warranted jointly against the town and the officer, as well by a just construction of the statute itself, as by analogy to the cases against master and servant. The result is, that in our opinion there is not a misjoinder of defendants.

The judgment of the county court is therefore reversed, and the declaration is adjudged to be sufficient.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

THIRD JUDICIAL CIRCUIT.

JUNE TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

NOAH PRESTON *v.* ROBINSON & ROSS.

Deeds. Town Clerk. Certificate. Tenants in common. Severalty. Possession. Parol. Jury.

It is the duty of a town clerk to certify a copy of the record, and if he certifies the copy to be "a true record of the deed, recorded in his office," it appearing from the copy that such a record existed in the office, it will be intended that the clerk certified from the record.

The deeding of a given number of acres to one man, and another number to another, thus conveying the whole right to both, there being nothing to show that the land was intended to be conveyed in severalty, will create a tenancy in common, and they will hold in common, in the proportion of the number of acres specified in their deeds.

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And even if the deeds showed that A.'s right lay in severalty, and the other owner, B., did not object to A.'s acts of possession, C., a mere stranger, could not, and C.'s intrusion might justly be regarded as a violation of A.'s possession.

So, too, A.'s contract to purchase the right of B., would enable A. to refer his acts upon the land to B.'s deed, in order to determine whether they were to be regarded as possessory, or mere torts; it has often been so decided, where the license to enter was in writing, and the same results would follow when the contract is not in writing.

When the deed describes the land, as being within the original charter limits of a town, we are to look to the charter for the right, and then to the right for its severance, and there identify the subject matter. This may always be done by parol, and it is not affected by a change of the name of the town, or setting a portion of it to another town.

When there are facts important to be considered in giving a construction to a deed, and those facts are in dispute, it may properly be submitted to the jury, under a hypothetical charge of the court.

TRESPASS *quare clausum fregit.* The defendants pleaded *liberum tenementium.* The plaintiff new assigned, setting out the *locus in quo*, by abuttals; to which defendants plead the general issue, and trial by jury.

The plaintiff, to sustain the issue on his part, offered, in evidence, a deed from Paul Atwood to himself, dated November 20, 1829, of seventy-six acres of lot number 137, in the town of Huntington, drawn to the right of James Ferris, son of Benjamin Ferris. This deed was objected to by the defendants, because it described the lot as being in the town of Huntington, and not in the town of Bolton. The plaintiff then gave, in evidence, an act of the legislature, passed in the year 1808, annexing a part of the town of Huntington to the town of Bolton. The plaintiff also introduced the town clerk of Huntington, who produced an ancient plan of said town of Huntington, as originally chartered, who testified, that he received the plan from his predecessor in office; that he had been town clerk for three years, during which time the plan had remained in the office, and had been consulted and treated, by the inhabitants of the town, as a correct plan of the town. He also testified, that a red line, drawn across said plan, was understood to be the line indicating the division line between that part of Huntington annexed to Bolton in 1808, and the remainder of the town; that he had never been on the line, or examined it personally.

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It appeared from the plan, that there was no lot number 137, in the present limits of the town of Huntington, but there is a lot of that number in that part of Bolton, which was formerly a part of Huntington.

The plaintiff also introduced the records of the original proprietors of the town of Huntington, from which it appeared that lot No. 137 was drawn to the right of James Ferris, son of Benjamin Ferris, being the same named in said deed offered as aforesaid. And it also appeared, that there is no lot within the present limits of Huntington, drawn to the right of the said Ferris.

Upon this evidence, the court allowed said deed to be read in evidence to the jury, to which defendants excepted. The plan was referred to as part of exception, also said act of 1808. The plaintiff also offered in evidence a copy of a deed of one hundred acres in lot No. 137, dated June 15, 1827, from Samuel Atherton to Josiah Preston, which was objected to by defendants, on account of an alledged insufficiency in the town clerk's certificate upon said copy. The said certificate was as follows: "I hereby certify the above to be a true copy of a deed from Samuel Atherton to Josiah Preston, said deed dated June 15, 1827, and recorded in Vol. 4, page 236 of Bolton land records.

J. H. WHITCOMB, *Town Clerk.*"

The court overruled said objection, and admitted said copy to be read, to which the defendants excepted.

The plaintiff then gave evidence, tending to prove that as early as 1829 he entered upon said lot No. 137, claiming to be the owner of the same by virtue of the deed aforesaid, from Paul Atwood to him, and also as a purchaser of the interest of the said Josiah Preston, and that he had ever since claimed to be the sole owner of the said lot. The plaintiff's evidence also tended to prove that from 1829 to 1847 or 1848, the plaintiff had, from time to time, taken timber from the said lot, and some years, had taken large quantities of timber from the lot, and it did not appear that any other person had claimed the lot, or ever exercised any acts of ownership upon it. The lot had been used by the plaintiff as a timber lot wholly, and no part of it had been cleared or fenced. The evidence also tended to prove that the lot contained about 139 acres and was surrounded by lot lines, in the usual manner of lot lines.

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A copy of the original survey bill of lot No. 137, was also introduced in evidence, but it appeared that the lines, as indicated by the survey bill, would not compare with the lines of the lot as indicated upon the plan. The plaintiff also gave evidence tending to prove, that the defendants entered upon said lot No. 137, in that part of Bolton formerly Huntington, and cut and took away a quantity of standing trees, of the kind mentioned in the plaintiff's declaration.

The defendants introduced no evidence.

The court charged the jury, that if there was no such lot as No. 137, in the town of Huntington, drawn to the right of the said Ferris in 1829, as was described in the deed from said Atwood to the plaintiff, but there was such a lot drawn to said right in that part of Huntington which had formerly been annexed to Bolton, and that was the lot really intended to be conveyed by the deed, then the deed would have the same effect, as if the whole description had been correct. That if they found that said lot was marked by definite lines and boundaries, and that the plaintiff entered upon said lot as early as 1829, and had used the same in the same manner the owner of such property ordinarily does, for more than fifteen years, claiming to be the owner thereof, then he had made a good title thereto; and also, that if there was in fact a marked line running around said lot, it was immaterial whether the line corresponded with the lines of the lot, as indicated by the original survey bill.

The defendants insisted, and so requested the court to charge the jury, that if the plaintiff entered upon said lot, claiming under his deed from Paul Atwood, that his claim could be to no more than was covered by the deed, and that as the deed purported to convey only seventy-six acres of said lot, and did not locate it, then the deed could have no operation unless the grantor and grantee mutually located the part conveyed, and that as there was no evidence of any such location or of any location, by the plaintiff, that his deed could have no operation.

The court declined so to charge, and charged the jury upon this point, that the deed from Paul Atwood to the plaintiff of seventy-six acres out of lot No. 137, conveyed to him an undivided interest in the whole lot as tenant in common, and if he entered under this deed and took possession, claiming the whole lot, it

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would give him a constructive possession of the whole lot. To which the defendants excepted.

The charge as to the commission of the trespass by the defendants was not objected to. The jury returned a verdict for the plaintiff. After verdict, the defendants made a motion in arrest of judgment, which the court overruled, to which, and also to the charge of the court and to the admission of the evidence as above stated, the defendants excepted.

L. Underwood for defendants.

The defendants insist that the deeds were not admissible for the following reasons.

1. The deed from Paul Atwood to plaintiff describes the land as located in Huntington, in 1829, and parol evidence was inadmissible to contradict the deed.

2. The deed is of seventy-six acres of a lot containing 139 acres and is not located by the deed, and there was no evidence of a location by the parties. The deed could have no operation until the land was located. 4 Bac. Alr. 525. 2 Co. 137 Heywood's case.

The plaintiff does not claim a legal paper title, but claims a constructive possession of the whole lot, under color of the deed from Paul Atwood, and there was no evidence tending to show any claim to any lands either in Bolton or Huntington, by Paul Atwood or Samuel Atherton. So there is nothing to show that they intended to convey anything but what is mentioned in the deed. A party, to establish color of title under a deed, cannot be permitted to show that the deed covers land not mentioned or described in the deed itself. His constructive possession only arises from a prescriptive claim, co-extensive with the lands described in the deed, under which he takes possession, which is notice to others of the extent of his claim. *Hull* v. *Fuller*, 7 Vt. 100. *Rich* v. *Elliott*, 10 Vt. 211.

The deed only purports to cover seventy-six acres of 139, this does not create a *tenancy* in common of the whole lot, as the court charged. *Clapp* v. *Beardsley*, 1 Vt. 151.

The copy of the deed from Samuel Atherton to Josiah Preston, was not properly admitted. It does not purport to be a certified copy of record, and the town clerk has no authority to certify a copy of deed.

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There was no evidence to show any intent of the grantors, than what is to be gathered from the deeds themselves. This is a mere matter of construction, which is to be decided by the court, and should not be submitted to the jury. *Stevens Exr.* v. *Hollister*, 18 Vt. 294.

A. B. Maynard, Kasson & Edmunds for the plaintiff.

1. The deed from Atwood to the plaintiff, describing the land conveyed, as in the town of Huntington, and drawn to the right of James Ferris, son of Benjamin Ferris, and numbered 137, (although there was no such lot in Huntington at the date of the deed,) was properly received as evidence of the plaintiff's title to the *locus in quo*, in Bolton, in connection with evidence that all parts of the description, (except the town,) applied to the *locus in quo*, and not to any lot in the town of Huntington, upon the common principle of the explanation of latent ambiguities, in the location of grants, of which no subject can be found, satisfying all their calls. *Lambe* v. *Reaston et ux.*, 5 Taunton 207. *Jackson* v. *Clarke*, 7 Johns. 217. *Jackson* v. *Loomis*, 19 Johns. 449. ——— v. *Young*, 3 Peters 320. *Boardman* v. ———, 6 Peters 328. *Worthington et al.* v. *Hylyer et al.*, 4 Mass. 196.

2. It sufficiently appeared from the town clerk's certificate, upon the copy of the Atherton deed, that it was a copy from the land records of Bolton.

3. The charge of the court, leaving it to the jury to say whether, upon the testimony, the *locus in quo* was the lot mentioned in the Atwood deed was correct, location and identity being exclusively questions of *fact*. *Mitchel et al.* v. *Stevens*, 1 Aiken 16. *Doe* v. *Burt*, 1 Tenn. R. 701. *Hodges et al.* v. *Strong*, 10 Vt. 247.

If the plaintiff was in constructive possession of the whole lot under the Atwood deed, it was immaterial whether it was as tenant in common or otherwise.

It is a principle of universal and unvarying application in the construction of grants, that the construction most certain and favorable to the grantee must prevail. *Hathaway* v. *Power*, 6 Hill 453.

The opinion of the court was delivered by

REDFIELD, J. This case having been argued during the pres-

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ent week, and the statute giving us no discretion to delay the judgment, we could not be expected to give a very elaborate opinion.

There seems to us to be no very great perplexity in most of the questions involved.

1. We think the copy of the deed from Samuel Atherton to Josiah Preston, must be regarded as properly certified by the town clerk. He certifies the copy to be a true copy of the deed recorded in his office. We think, as it was manifestly his duty to certify a copy of the record, and as it clearly appears from the copy, that such a record existed in the office, it ought to be intended that the clerk certified from the record, the custody of which he of right had, rather than from the deed the custody of which he could not properly have. And in either case an uneducated town clerk might well say "a copy of the deed." In common language, even an attorney would so denominate it.

This deed and the deed to plaintiff were no doubt intended to cover the whole right, and do in fact cover more than all. We are not prepared to say, that if it were necessary to decide that point, that the deeding of a given number of acres to one man, and another number to another, thus conveying the whole right to both, there being nothing to show that the land was intended to be conveyed in severalty, it ought not to be regarded as creating a tenancy in common. We think it would. The case of *Clapp* v. *Beardsley*, 1 Vt. 151, is evidently put upon the ground that the number of acres by the deed, were intended to be adjoining the other land, and so compose a particular portion of the lot. But here, there seems to be nothing to show any such intention, and it seems to us, that plaintiff and Josiah Preston are properly regarded as holding the lot in common, in the proportion of the number of acres specified in their deeds. *Clapp* v. *Beardsley*. The final conclusion of that opinion was, that the deed was not intended to convey any portion of the land in dispute, of course it could create no tenancy in common, if it conveyed no interest in that land.

And even if the deeds showed that plaintiff's right lay in severalty, and the other owner did not object to his acts of possession, a mere stranger like defendants, could not, and his intrusion might justly be regarded as a violation of the plaintiff's possession.

So too, the plaintiff's contract to purchase the right of Josiah Preston, would enable him to refer his acts upon the land to Jo-

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siah's deed, in order to determine whether they were to be regarded as possessory, or mere torts. This has often been decided when the license to enter was in writing, and we do not see but the same result would follow where the contract is not in writing.

The contract is not shown for the purpose of effecting the conveyance of any interest in land from one man to another, which could not be done by a contract not in writing, or indeed by any instrument not having the requisites of a deed. And in the present case nothing appears to show that Josiah Preston had any title to the land. This deed is referred to, to show plaintiff's claim of title. And it may as well be shown by parol, as one may show that he made an entry by his servant or agent, under a deed to himself, the oral evidence being necessary to connect the entry with the deed.

We think both these deeds sufficiently describe the land as being within the original charter limits of Huntington. One of the deeds, that of Josiah Preston, expressly says, "lying in the original grant of New Huntington, laid to the right of James Ferris, son of Benjamin Ferris." Here is scarcely ground for equivocation. And the other deed is in fact, equally explicit, "situated in the town of Huntington, drawn to the right of James Ferris, son of Benjamin Ferris." This obviously refers to the town of Huntington as *chartered*. It is a portion of a right of land in that charter, which is conveyed. Any one would look to the charter for the right, and then to the right for its severance, and there identify the subject matter. This may always be done by parol. And it is not affected by a change of the name of the town, or setting a portion of it to another town. Suppose some one should now convey the right of some one of the original proprietors of Saltash, in the county of Windsor? There is no such town in that county, at present. Would any one hesitate, upon finding such a right in Plymouth, which was formerly Saltash, to give effect to the deed?

It is true, there was nothing in this case to submit to the jury, there being no dispute in regard to those facts which were important to be considered in giving a construction to the deed, it became a mere question of law. But if these facts had been in dispute, it would have been properly submitted to the jury, under a hypothetical charge, as is often done in cases of this kind.

Judgment affirmed.

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Sally Meach v. Ezra Meach and Others.

Donatio Mortis Causa. Real Estate. Personal Estate.

A gift of real estate cannot be sustained as a *donatio mortis causa.*

A gift of all the donor's personal property, in prospect of death, is a valid *donatio mortis causa.*

M. being desperately sick, in prospect of death, executed to his wife, a deed in the common form, of all his real estate, and at the same time executed a separate deed to her, of all his personal property, consisting of the stock on his farm, and choses in action. Both deeds were duly recorded. M. continued hopelessly sick for a little more than a month after the execution of the deeds, when he died. Upon a bill for a specific performance, it was *held*,— 1st, That the deed of the real estate could not be sustained as a *post-nuptial* settlement, nor could it be construed and carried into effect as a testamentary disposition of the donor's property, it not being within the Statute of wills, nor as a *donatio mortis causa.* 2d, That the deed of the personal property was valid as a *donatio mortis causa.*

The question of what amount of property can pass by a *donatio mortis causa* considered.

Appeal from the court of chancery. The facts sufficiently appear in the opinion of the court.

M. L. Bennett and ——— for orator.

D. A. Smalley, E. J. Phelps and *L. E. Chittenden* for defendants.

The case having been argued by counsel, was held under advisement until the December term, 1852, when the opinion of the court was delivered by

Redfield, Ch. J. This is a bill in equity, appealed into this court from the decree of the chancellor. The facts in this case, are not very fully shown, but sufficient appears, perhaps, to enable us to determine the case understandingly.

On the 13th day of May, 1847, Avery Meach, being desperately sick of consumption, executed in common form, a deed of all his real estate to his wife, the orator; the value being about ten thousand dollars. On the same day, and at the same time, he

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executed a deed of all his personal property to his wife also, consisting of stock upon his farm, and choses in action to a considerable amount. The deeds were recorded in the Town Clerk's office on the 31st day of May, 1847. The grantor continued hopelessly sick until the 23d of June, 1847, when he died. The deceased left no child and no father or mother; his nearest heirs being of the degree of brothers. The orator continued in quiet possession of the property until August, 1847, when administration was taken out, and the possession of the property demanded of her, which she declined to surrender. It was arranged that she should retain the possession of the property until this suit could be instituted, and the title determined. The debts due from the estate, are between three and four hundred dollars. The grantor had adopted a female child, who is now dependant upon the orator in some degree.

It is first important to inquire what the purpose and intentions of Avery Meach were, in executing these conveyances, and then how far that purpose can be carried into effect, consistent with the established principles of law.

It has been claimed on the part of the orator, that this may be fairly regarded as a *post-nuptial* settlement, for the support and maintenance of the wife, not only during the coverture, but also, in the event of the husband's death, and so be upheld as a gift *inter vivos*. But it seems to us that the transaction is incapable of being viewed fairly, in that light. It had no reference to any settlement upon the wife, for her separate maintenance during the continuance of the relation subsisting between the parties. And marriage settlements, whether *post-nuptial* or *anti-nuptial*, have a chief reference to the independant support of the wife and her dependants, whether children or others. A marriage settlement, even a *post-nuptial* settlement, out of the separate property of the husband, which it is perfectly competent for him to make valid against his heirs, and even subsequent creditors if he chooses, and which have often been upheld by courts of equity, even when made directly between husband and wife, without the intervention of trustees, (2 Story's Eq. Juris. p. 817, and the numerous cases cited in note 2,) would certainly be a very gross misnomer, if, by *post-nuptial*, we were to understand an arrangement not made after marriage, which is its common import, but one which was only

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to go into effect, and have operation, after the nuptial relation should have been forever extinguished by the natural death of the husband. It is not claimed, that the terms can be extended to any such transactions; but it is believed that the present case is incapable of being fairly viewed in any other light. Here is a man in the last stages of consumption, within a few weeks of his death, and doubtless fully conscious of the impossibility of much longer maintaining any hold upon property, who makes a sweeping disposition, in the present tense, of all his earthly possessions. Now it is claimed, that this may be treated as a rational, (and to be maintained in a court of equity, it must be also a reasonable,) disposition of property *inter vivos* between husband and wife, in order to secure a suitable provision, or portion, or maintenance, or settlement upon the wife.

Men that have property, and acquire it as this man did, by long continued industry and scrupulous economy, do not ordinarily, it may be said, part with it at once, and without reluctance, even into the hands of the most tried friend. This is such a reversal of the relations hitherto subsisting between the grantor and the grantee, that nothing but the certainty and the nearness of death would have induced the change. It is in vain to affect to convince ourselves that any less motive could have formed the prevailing consideration for the transaction.

And could we for a moment entertain the belief that this was intended as a *bona fide* settlement upon the wife, viewed as a mere transaction, *inter vivos*, it would be impossible for a court of equity to maintain it, on the ground of its unreasonableness. We can entertain no doubt that, had the grantor recovered his health, and the grantee, by her friends, claimed to hold the property against him as a gift, a court of equity would have decreed a complete restitution, upon the ground that the contract, as a present operative contract, was made under a material misapprehension of the important facts, the real consideration for the contract having, in fact, altogether failed. As is said in Justinian's Institutes, upon the subject of gifts *mortis causa*, *mors causa donandi magis est quam mortis causa donatio*. Death is rather the cause or consideration of the gift, than the mere occasion of its being made. And that view applies with great force to the present transaction. It had exclusive reference to a period beyond the life of the do-

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nor, and could never have been intended to have any operation in any other event. It was, in fact, a testamentary disposition of the property. And when a court of equity is applied to for the purpose of carrying a contract into specific effect, it ought not to be expected to do it in any other sense than that by which it was understood between the parties. Refinements, evasions, forced and false glosses, have always an ugly sound in the mouth of a court of equity. If the contract cannot stand upon its own foundation, it ought not to be expected of a court of equity to decree a specific performance. And hence, while a court of equity recognizes a settlement of property by the husband upon the wife, even out of his own estate, and altogether aside of any property received by the husband from the wife, and often without the intervention of trustees, and originating altogether after the marriage, as perfectly valid, and to be upheld, and its execution aided by the court, no case can be found where any such settlement of property upon the wife as the present, regarded as a mere settlement or separate portion, has ever received the countenance of a court of equity. And in *Beard* v. *Beard*, B. Atkins, R. 73, where one attempted to make a very similar settlement upon the wife, in order to avoid a will which he had made in a drunken passion, at a tavern, by which he had given all his property to a brother, Lord Hardwick says,—"A man here has done two very unreasonable acts, and if it should happen that if one trips up the heels of the other, it is a very fortunate thing to set everything right again." But he held the conveyance to the wife void, as unreasonable, saying, "Neither will this court suffer the wife to have the whole of the husband's estate, while he is living, for it is not in the nature of a provision, which is all the wife is entitled to." And this is the settled law of the court of chancery at the present day.

Viewed, then, as a disposition of the donor's property to take effect at his death, the important inquiry remains,—can it be carried into specific effect in a court of equity?

There is, no doubt, always a disposition in courts of equity to uphold these informal testamentary gifts, so far as they are understandingly made, and are perfectly reasonable and considerate, which is no doubt eminently true of the present case, considered, as it was intended, as a disposition of the donor's property, to become operative at his death only. But a court of equity could

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scarcely be expected to reform a man's last will and testament, even if it were certain they could thereby, in the particular case, come more precisely at his real intention than is expressed by the scrivener who drew the document, which was formally authenticated. Much less could a court of equity be allowed to create a last will for one, from deeds and other writings informally executed by him, and which he was at the moment informed and believed, up to the time of his death, would effect the purpose expressed therein. This would be a sweeping, wholesale repeal of all the statute requisites in regard to wills. And I confess that during the argument of this case at the bar, which was made exceedingly interesting on all hands, I could not disabuse my mind of the impression, that stripping the bill of all circumlocution, in its full scope, it was a petition to the court of chancery to create, out of these deeds, a last will and testament for Avery Meach. Feeling from the first, a ready inclination to listen to the object of the prayer of the bill, my mind was nevertheless continually haunted with the sense of absurdity at the very singular course it seemed necessary to take, in order to effect it — i. e., to make both the will and probate of the will of the donor. And in the examination of the case, with a sincere willingness to escape from that conclusion, my first impressions have been confirmed, at least so far as the real estate is concerned. A gift of real estate cannot be sustained, as a *donatio mortis causa*, for that only extends to the personality. We have, then, nothing remaining, so far as that is concerned, but the naked deed from husband to wife. This, it is admitted, cannot operate at law; and when the court of equity is applied to for a decree of specific performance, and to compel the execution of the contract by a competent trustee, *e. g.*, the administrator, they are met on the threshold by the obvious fact, that this was understood by the parties, to be neither more nor less than a testamentary disposition of the donor's property. And if it is not regarded in this light, it is incapable of being sustained as a disposition of property *inter vivos* upon the ground of its unreasonableness. We can only say that we deem it impossible to give the deed of real estate the effect intended by the parties, without virtually dispensing with the essential requisites of the Statute of Wills.

This view of the subject is not peculiar to this court. In a late

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case in the English chancery, before Vice Chancellor, Knight Bruce, so late as June, 1851, *Moore* v. *Darton*, 7 Eng. Law and Equity Rep. 134, a doubt is suggested, whether the late English Wills Act, which is not more stringent than our own, "has not precluded all donations," of personal property *mortis causa*. But that learned Judge did ultimately come to the conclusion that such was not the case. There can be very little doubt that a case of the character of the present, including both real and personal property, and extending to all a man's earthly possessions, would have been regarded by that court, as altogether repugnant to the Wills Act; certainly so far as the real estate is concerned.

In the late case of *Headly* v. *Kirby*, decided by the Supreme Court of Pennsylvania, in May, 1852, American Law Register, Nov. p. 25, it was expressly held, that "A gift of all the donor's property in prospect of death, is not a *donatio mortis causa*. It is not valid, unless executed as a written or as a nuncupative will." The case seems to have been very elaborately argued by the most competent counsel, and is supported by a somewhat ingenious argument from the bench, by Mr. Justice LOWRIE. And the Editors of the Register evidently incline to support the decision as altogether unanswerable. As the property in that case was all personal, and what was done might have been regarded as sufficient to constitute a gift *mortis causa*, it may be somewhat questionable how far a *donatio mortis causa* is to be altogether invalidated, by reason of its embracing the major part, or the whole of one's property, if it be in other respects unobjectionable. Neither the English nor American cases have attempted any such criterion before, and it would seem, at first blush, rather difficult of application. But if these cases show no more, they may be regarded as evidencing a disposition on the part of courts in both countries, not to extend these informal testamentary dispositions of property, in manifest abuse and disregard of the salutary enactment in regard to wills.

It only remains to inquire how far the deed of the personal property, in this case, can be maintained as a *donatio mortis causa*.

1. It seems never to have been regarded as any objection to a gift, *mortis causa*, that it was made by the husband directly to the wife. The elementary books all so treat it. 2 Kent's Com. 7

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Ed. 556. (445); ib. 178. The civil law was clearly so, Inst. 2, 7, 3; Cooper's Justinian, 102, 103, where it will fully appear that not only gifts *mortis causa* between husband and wife were sanctioned, but even between them *inter vivos*, as *donationes propter nuptias*. And numerous decided cases in the English Chancery fully establish the point that such gifts are good between husband and wife. *Laibson* v. *Lawson*, 1 P. Williams' R. 441. *Miller* v. *Miller*, 3 ib. 356. *Jones* v. *Selby*, Prec. in Ch. 300. The latter case is that of a house-keeper, to be sure, but the delivery was by giving up the key of a trunk, and was held sufficient, notwithstanding the donor held the custody of the trunk and received the interest on the government security, which was the subject of controversy. But the case failed upon another ground.

2. This case combines, we believe, all the essential facts requisite to constitute a good *donatio mortis causa* by the common law, and many of them strikingly identical with the very words used by the civil law writers, in defining these gifts, from which the thing was transplanted into the English law. *Mortis causa donatio est, quæ propter mortis fit suspicionem, cum quis ita donat, ut siquid humanitus ei contigisset, haberet is, qui accipit; sin autem supervixisset is, qui donavit, reciperet; vel si eum donationis poenituisset, aut prior decesserit is, cui donatum sit. Et in summa, mortis causa donatio est, cum magis se quis velit habere, quam eum, cui donat: magisque eum, cui donat, quam heredem suum.* That was the very object and intention of this gift; and the transaction answers well enough the requisites of the English chancery law. It was made during the last sickness, in the prospect of certain and speedy dissolution, to take effect fully after death only. It was but a rational and reasonable gift under the circumstances, and was intended to become inoperative, in case of the recovery of the donor from that sickness, or his surviving the donee, or changing his intention. All these incidents are not fully set forth in the instrument of donation, and we do not find that is essential to the validity of such a gift. If that should even prove to be so, to a greater extent than appears in this deed, which has not been discussed at the bar, we entertain no doubt a court of equity will lend its aid to fully effect the purpose of the donor, by supplying any formal defect in the instrument by way of reforming it, against the personal representative, who, in these gifts, is regarded as a trustee for the donee.

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Says Mr. Justice Story, 1 Eq. Jur. p. 673, "the doctrine no longer prevails, that where the delivery will not execute a complete gift, *inter vivos*, it cannot create a *donatio mortis causa*, because it would not prevent the property from vesting in the executor." On the contrary, the doctrine now established by the highest authority, is, that courts of equity do not consider the interest as completely vested in the donee, but treat the delivery of the instrument as creating a trust for the donee, to be enforced in equity. *Duffield* v. *Elwes*, 1 Bligh's R. N. S. 497, 530, 534; same case affirmed in the House of Lords, by the name of *Dow* v. *Hicks*, 1 Dow & Clark, 1, reversing the decree Vice Chancellor Leach, 1 Sim. & Stu. 239. In this case it was finally established, in England, that a bond and mortgage passed by mere delivery, without any written assignment, as a good *donatio mortis causa*. And it seems now to be well settled that any chose in action, whether negotiable or not, whether simple contract or specialty, if it be the contract, or promise of some other than the donor, and do not constitute any obligation upon the donor, may, by mere delivery, constitute a good gift *mortis causa*. And if there is no formal delivery, but an assignment under seal, and perhaps only in writing on a separate paper, this will, by being delivered, constitute a good delivery of the thing, and create a trust, in favor of the donee, against the personal representative. We have noticed this, in the extract from Story's Equity Jurisprudence. Lord Chancellor Loughborough, in discussing this subject in *Tate* v. *Hilbert*, 2 Vesey, Jr., 120, says, "It is not necessary to discuss, in this case, whether delivery is necessary in all cases. Perhaps it is not difficult "to conceive that it might be by deed or writing." He further intimates, that there is no objection to a formal deed, as constituting a sufficient perfecting of the gift to create the trust in favor of the donee. And upon principle, it would seem, there could be no objection to creating the gift by deed, without any formal, manual tradition of the thing; which, in many cases, would be difficult, and in others, like the present, consisting, in part, of a large herd of cows, altogether idle and absurd. And the deed imports conclusively a sufficient consideration,— is an estoppel upon the donor and his personal representatives, and, after delivery and public registration, is a sufficient setting apart of the property to the use and control of the donee, and far less liable to perversion or abuse,

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than any mere parol gift, with the most ceremonious delivery. In the case of transfer of property by deed, nothing remains to perfect the gift. It does not remain inchoate, or incomplete, or in any sense revocable, after the delivery of the deed. Chancellor Kent, says, 2 Comm. 559, 7th Ed. in note, "The requisites of a "valid *donatio mortis causa* are well collected, in a learned note to "*Walter* v. *Hodge*, 2 Swanst. 106, where it is stated, and proved, "that it requires delivery of the property, or the documentary ev-"idence of it." This has reference, perhaps, to choses in action primarily; but it is difficult to see why the deed of a thing being delivered is not as much a delivery of the thing, as the delivery of a bond or note is a delivery of the debt. In principle it clearly is so. This seems to be a full recognition of this mode of perfecting the gift, both by the learned commentator and the annotator of Swanston. And if any question could be entertained of the sufficiency of the deed itself, after delivery and formal registry, to perfect the gift, we do not perceive but there was, in fact, all the actual delivery of this property of which it was susceptible, as between husband and wife, whose possession is of necessity, in some sense, in fact, and always in law, identical. If one had been required to devise the best mode of perfecting a gift of this kind between husband and wife, it could not, perhaps, under the circumstances, have been done better, or more in accordance with legal principles, than this was, altogether accidentally we must suppose, done. For the thing seems to have been got up, in the main, very inartistically; and the actual delivery is all that could have been made, without involving the parties in acts more or less absurd and ridiculous.

In examining the case, it occurred to me that some might object to this deed as a gift *mortis causa*, inasmuch as it does not, in terms, very explicitly provide that the gift should only take effect after the donor's death. In a mere oral gift this is often implied, from the attending circumstances, as is very obvious in the present case. But the gift being by deed, we are, in a measure, confined to its terms, construed with reference to the attending circumstances. And as this deed professes in terms to convey, not only all the donor's property at the date, but all of which he should be possessed at his decease, it is fair, we think, to give the words that signification, that the donee's full right under the deed should

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not become absolute and perfect, except in the event of the donor's death.

But if this were doubtful, there is no doubt a court of equity would lend its aid to perfect the deed in this particular. It is said in *Harris* v. *Clark*, 2 Barbour's S. C. R. 94, 98, by Gridley, J., "That in gifts *inter vivos*, a court of equity will not compel the "donor to complete his gift, or an executor to complete the gift of "his testator; whereas, in the case of gifts *mortis causa*, the donor "may successfully invoke the aid of the court of chancery for that "purpose." In *Tollett* v. *Tollett*, 2 P. Wms. 489, the defective execution of a power by will, when it should have been by deed, was supplied in equity in favor of the wife. And the defective execution of a power is always supplied in courts of equity, when that is necessary to perfect a gift *inter vivos*, even if that is the only instance in which that court does interfere to perfect a gift *inter vivos*. But it is every day's practice for such courts to lend their aid to perfect gifts *mortis causa*. But this, we conceive, is not necessary in the present case. We think, therefore, that the deed of the personal property, with the attending circumstances, did constitute a good gift *mortis causa*, and that the orator must hold it. And as the taxable costs are small, and the suit is an amicable one, and neither party fully prevails, no costs should be allowed.

Decree of court of chancery reversed, and case remanded to that court to pass a decree according to this decision.

NOTE. I have not deemed it important to go into any exposition of the history of the law in regard to gifts *mortis causa*, or indeed into any extended discussion of its policy or present state. For, notwithstanding the efforts which seem to have been made to limit its operation, even as far back as the time of Justinian, who required all such gifts to be made in the presence of five witnesses, and also subjected them to the operation of the *lex Falcidia*, by which one was prohibited from disposing of more than three-fourths of his estate to the prejudice of his heir; still the thing maintains its hold upon the jurisprudence of most of the European states, and is evidently a good deal extending its operation in the American states.

One cannot but feel that it was never properly intended to apply to a general disposition of a large estate to the utter subversion of the Statute of Wills. And still, when we attempt to limit its operation, we encounter embarrassments not readily disposed of. If one may remit a debt of £500, about $2,500, by the simple act of delivering the receipt for it to a third person, a servant attending the death bed, with a general expression of desire, in the briefest words, that the debt should be cancelled, which was the case of *Moore* v. *Darton*, 7 Eng. Law and Equity R. 134, and which was sustained without difficulty by a distinguished English Vice

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Chancellor, we can scarcely be expected to say that twice that amount, therefore, is not a good donation *mortis causa*. And although, in practice with us, this mode of final disposition of property has oftener been confined to some favorite articles of personal attire, or ornament perhaps, like watches and jewels, yet an examination of the cases will show a wonderful variety in the character and extent of property disposed of in this mode, often including all one possesses, consisting of the largest extent and variety of property, both in possession and in action; and thus, in fact, amounting to a nuncupative will. And still I find no case, except the late case in Pennsylvania, where any attempt has been made to limit its operation, on account of the comparative or absolute extent of the property disposed of. And the more I have reflected upon the subject and compared the cases, with a view to evolve some rational and practicable principle of limitation to the extent of its operation, the more I have felt constrained to declare that it cannot be done by any powers of abstraction or generalization, which my short sight is able to command.

If the servant, whose whole estate consists of a few hundred dollars, balance of earnings, in the hands of his employer, and five pieces of property, in possession, is to be allowed, in his last sickness, to dispose of it to five different persons by mere words, and by committing the entire evidence of debt to a fellow servant, which seems now to come within all the best considered cases upon that subject, it would seem invidious to hold, that when the property amounts to thousands, composing the principal estate of a substantial householder, that therefore it could not be conveyed in this mode. And if the man of great worldly possessions, who has executed his will in the most reverent formality, may, when death presses him sore, modify that disposition, which alone the written law of the land recognizes, by taking from his secret drawer securities for debt to the amount of thousands of dollars, and making an irrevocable disposition of them after death, by the brief words "I give," and the simple act of delivery to the wife, which, in law, is a delivery to himself, a mere change from one hand to the other, it would certainly not be easy to say that one whose whole property did not amount to one tithe of that sum, or if it did exceed it by hundreds of dollars, could not do the same. And yet it will be noticed, that the last case supposed is the well considered and constantly recognized case of *Miller* v. *Miller*, 3 P. Wms. R. 356.

It ought, perhaps, here to be said, that the present case is decided neither upon the sufficiency of the deed, nor of the delivery of the property, such as it was, which is not very fully shown in the case, but which we feel justified in treating as being such as was natural, under the circumstances, where the husband had become so incapable of longer managing or controlling his property and business, that it fell exclusively under the control of the wife, even before his death. It is upon neither of these grounds alone that this case is decided, but upon both, not intending to go further, in settling the law upon this perplexing subject, than the imperious necessities of the case demand.

Some other views of this case undoubtedly might be taken, but most of them more or less remote from the actual merits of the case. As a gift *inter vivos*, I am not aware that the wife is regarded as possessed of any peculiar equity, beyond her legal rights, more than any other donee. If the property had been the result of her own earnings exclusively, or of accumulations by her for her own use, out of an allowance made her by her husband, or especially if it had been the result of money which was hers at the marriage, or by inheritance subsequently, no doubt a court of equity, making her equity the basis of its action, might extend

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relief, in many cases, where otherwise it would not. But there is nothing of that kind in this case. And treating it as a mere gift *inter vivos*, a court of equity will never interfere to make it operative, except in the single case of the defective execution of powers, as we have seen, which, in practice, are but little known among us. Equity has oftener, by far, interfered to carry into effect the apparent purpose of the donor, in regard to his bounty, where the gift, although in form a gift *inter vivos*, was in fact a testamentary disposition among his heirs. This has often been done in regard to donations *mortis causa*, as we have shown, and in one instance certainly, in this State, in the case of real estate. *Thompson* v. *Welch*, Ben. Co. Sup. Ct. 1849, not yet reported.

But that was to do equity and justice among the donees, according to the intention of the donor, and when the title at law confessedly passed by the deed of gift. And we are aware that deeds of land in this State, in repeated instances, which were in fact testamentary dispositions of property, and delivered as escrows, to become operative only in the event of the death of the grantor, have nevertheless been sustained and held valid, both at law and in equity. But that is upon the principle that the deeds were valid in themselves, and required no aid of a court of equity. But a deed cannot be delivered to the grantee to become operative upon the death of the grantor. In that case it must take effect presently, or not at all. The grantee cannot hold a deed as an escrow.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

FOURTH JUDICIAL CIRCUIT.

OCTOBER TERM, 1852.

PRESENT,

HON. STEPHEN ROYCE, CHIEF JUDGE.
HON. ISAAC F. REDFIELD, } ASSISTANT JUDGES.
HON. PIERPOINT ISHAM, }

ADDISON D. HAWLEY *v.* ELISHA MOODY.

Where the plaintiff contracted with the defendant for the lease of defendant's tavern house for one year, and delivered to defendant a gold watch in part payment for the rent, and the parties agreed to meet at a future day to make and execute a written lease, it was *held*, that this case falls within the statute of frauds.

It was also *held*, that the property in the watch passed to the defendant, and might have been sold by him, or legally attached upon his debts.

And if the party repudiating the future performance of the contract, has himself received advances, which he declines to pay for in the mode stipulated, it is regarded as equitable that *he* should refund in the usual mode, for money had, and for goods sold, and it is not in his power, without the consent of the other party, to revest the title of the specific things received.

And it was *held*, that this recovery may be had under the general counts.

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This was an action of

ASSUMPSIT. Plea, the general issue, and trial by the court.

On trial, the plaintiff gave evidence tending to prove, that on the 11th day of July, 1851, he contracted with the defendant, for a lease of the defendant's tavern stand in Waterbury, (called the Waterbury House,) for one year from and after the first day of September, 1851, for six hundred dollars; and paid the defendant at the time one hundred dollars, in a gold watch, which defendant received as a payment of one hundred dollars towards the rent. And it was further stipulated at the time, that the parties should meet at Mr. Dillingham's office as soon as he returned home, (he being absent that day,) and execute a written lease. The contract was all in *parol*. The plaintiff called upon the defendant for the lease, and the defendant soon after, on the same day, tendered the watch back to the plaintiff, which the plaintiff refused to receive, and the watch was afterwards attached by one of the plaintiff's creditors, and sold on execution against the plaintiff.

The defendant, on the 14th day of July, 1851, leased the same premises to one Howard for one year, and declined to lease them to the plaintiff. The plaintiff tendered to the defendant, on the first day of September, 1851, five hundred dollars in specie, and demanded a lease of the premises, according to the contract, which defendant declined.

The county court, March term, in Washington county, 1852, POLAND, J., presiding,— adjudged that plaintiff could not recover, and rendered judgment for defendant. Exceptions by plaintiff.

T. P. Redfield for plaintiff.

1. A parol lease, for one year only, is not within the statute of frauds. Comp. Stat. 384 § 7.

2. The payment of a part of the rent, in advance, was a *part performance* and takes the case out of the statute. Stev. N. P. 2 Vol. 1955.

3. But if an agreement to rent the premises for one year be within the statute, an agreement to meet the plaintiff at Mr. Dillingham's office, and there execute a valid lease, is not within the statute. *Squire* v. *Whipple*, 1 Vt. 69.

4. The defendant having leased the premises to another, and

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refused to perform the contract is liable to refund the consideration paid. Chitty on Con. 307–8. *Kidder* v. *Hunt*, 18 Mass. 328. *Sherburne* v. *Fuller*, 5 Mass. 133. *Lane* v. *Shackford*, 5 N. H. 130. *Shaw* v. *Shaw*, 6 Vt. 69.

Peck & Colby and *Dillingham* for defendant.

1. The subject matter of the agreement partakes of the *realty and creates an interest therein.* Any agreement, creating an exclusive right to land for a limited time, is within the statute of frauds, (4th Sec.) and void. Comp. Stat. Chap. 64. 6 East 612. *Hall* v. *Chaffee*, 13 Vt. 150. *Hibbard et ux.* v. *Whitney*, 13 Vt. 21.

Part performance will never enable a party to sustain an action at law. 13 Vt. 21.

2. *Ind. assumpsit* will not lie for the consideration paid, without a previous offer to *rescind* and a demand of the sum paid. *Warner* v. *Wheeler*, 1 D. Chip. 159. In no case will a contract be rescinded *in toto* unless both parties be placed in the identical situation which they occupied, this the defendant offered to do by returning the property received, and the plaintiff *refused to rescind.* He is not precluded from recovering the value when at the same time he sets up the contract as in force. Chitty on Con. 741–2 and notes.

The opinion of the court was delivered by

REDFIELD, J. 1. The statute of frauds in this State, contains no exception of leases, or contracts for leases *in futuro*, as is found in the English statute, and in some of the other States. This case falls, therefore, within the statute.

2. Part performance has not been regarded as any ground of relief at law; and it has not been considered that part payment merely amounted to such part performance, as to entitle the party to enforce the contract in equity even, or not generally.

3. The only question then is in regard to the part payment. It seems to be well settled, that the party repudiating the contract cannot recover for part payment under it ever, but that the other party may. *Shaw* v. *Shaw*, 6 Vt. 69.

To this extent, the counsel seem to understand the law alike, and that would settle the rights of the parties sufficiently, were it not that they seem to stand upon ceremony as to the mode, wheth-

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er the party making the payment in a specific thing, is bound to take back the same thing, when the contract is repudiated by the other party.

There can be no doubt the property passed by the sale and delivery to the defendant, the only question is, as to the effect of defendant's refusal to fulfil the contract. If the contract could be regarded as originally void, like a Sunday contract, then no property would pass, until a reaffirmance on some other day.

But here the contract is not void, as was expressly held by this court in *Philbrook* v. *Belknap*, 6 Vt. 383.

It has always been so held, whenever the question has arisen, notwithstanding the elementary writers, in a loose way, often speak of this class of contracts as void, meaning thereby, contracts upon which no action will lie. That is all the statute provides, "That no suit in law or equity shall be maintained upon them." But to all intents they are contracts, and perfectly valid for all purposes except actions, so long as they are acted under. There can be no doubt the property in this watch passed to defendant, and might have been sold by him, or legally attached upon his debts.

4. The only remaining inquiry then, is as to the effect upon the title of the watch, of defendant's refusal to complete the contract. If this were to be regarded like the case where one is induced to purchase property, by fraudulent representations, and where, upon the discovery of such facts, he elects to rescind the contract, as he may, then the property would revest. But here is no fraud in the contract, neither is it the object of the statute to attach to this class of contracts any mark of reproach.

The contract is innocent enough, if each party chooses to trust to the honor of the other party as to its performance. If that were not so, one could not recover for payments made under it. The contract is not void, or affected with any taint or turpitude, nor is it rescindable at the election of either party.

Either party, if he choose, may repudiate it, but that only operates upon so much of the contract as remains executory at the time, and does not repeal any thing done under it. For these purposes it remains in full force. And the party repudiating must be content to lose what he has done under it, as the contract remaining in force, the other party may defend under it.

But if the party repudiating the future performance has himself received advances which he declines to pay for in the mode

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stipulated, it is regarded as equitable that *he* should refund in the usual mode for money had and for goods sold, and it is not in his power without the consent of the other party, to revest the title of the specific things received.

This seems to us the only view consistent with general principles applicable to the subject, or with the decided cases, and manifestly just and equitable. If the party has bought goods which he declines to pay for in the mode stipulated, and which, but for his own act he might do, he ought and he must be content to pay in the usual mode of paying for goods sold and delivered, and this recovery may be had under the general counts. *Gray* v. *Hill*, 1 R. & M. 420. Chit. on Con. 305.

As the former cases upon this subject have adopted no principle at all analogous to allowing either party the power of recision of the contract, we feel reluctant to push ourselves upon an unexplored field, without some obvious and pressing necessity, in order to warp justice, which we think is not this case.

By the adoption of this new feature, even if it were more consonant with justice in the particular case, which we think it clearly is not, we should be fearful of ultimately encountering evils which are not apparent, at the moment. And there are some which we could easily foresee might arise. The specific things received in payment, might have been more or less put to use by the party receiving them, for which he ought to be accountable.

They might have been sold and transferred in different modes, and thus new rights and interests intervene. And if we adopt the principle of recision, we do not see, but in principle, it will cut off by the roots, all rights accrued under the contract before repudiation, which would certainly be unjust to the innocent party.

And as the repudiating party is always clearly in the wrong, it can be no hardship upon him, to pay in currency for what he has received in advance upon the contract.

If one party has the power of recision, then the other, and especially the innocent party, should have the power. The result of which must be, that however many times the property has changed hands, or under whatever circumstances the innocent party may pursue it and recover of the last proprietor, if not of each intervening one, which would often be attended with serious embarrassment and probable wrong.

Judgment reversed and case remanded for new trial.

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Gilbert H. Wood v. The Vt. Central Railroad Co.

Book Account. Contract.

Where the plaintiff contracted to build "rip rap" wall for the defendants, at fifty cents per cubic yard; there being no general usage or uniform custom proved, which should control the mode of measurement, it was held the term used, implies pay by the cubic yard, for the "rip rap," after the stone is fitted, and laid into wall.

Book Account. Judgment to account was rendered in the county court, and auditors appointed, who reported in reference to the item in dispute, substantially the following facts:—

The plaintiff, after having had some conversation with the president of the Railroad, and with the chief engineer, in relation to doing work upon section 3, of defendants road, submitted to the President a written proposition, of which the following is a copy:—

"Charles Paine, Esq.,

"Sir:

"Having a conversation with Mr. Moore, I have concluded "to do the work on the 3d section, as follows:

"Earth, per cubic yard, 13 cents.

"Rock, " " " $1.00

"Rip rap,—cubic yard, 50

"Respectfully yours,

(Signed) "G. H. Wood."

The defendants accepted the proposition, and the plaintiff proceeded to the work on the section.

In regard to the "rip rap" wall, the parties were at issue as to the manner of measurement. The plaintiff claimed that it should be measured after it was laid into wall. On the other hand, defendants claimed that it should be measured "in excavation," while in the solid. There was no special contract as to the manner of measurement. It appeared that rock, after broken into fragments, will measure from 20 to 40 per cent. more than in solid; and on this section, that the rock when deposited or laid into "rip rap," would measure about 33⅓ per cent. more than in the solid. The auditors did not find from the testimony, any uniform practice or general usage as to the measurement of "rip rap" wall. And reported the amount, if measured "in excavation," to be 7,689 cubic yards. Measured in the bank or wall, 10,252 cubic yards.

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The county court, March term, 1852,— POLAND, J., presiding, rendered judgment for the plaintiff for the largest amount. Exceptions by defendants.

Peck & Colby for defendants.

1. The plaintiff cannot sustain his claim to a fictitious estimate of the "rip rap," when the exact quantity is ascertained by measurement.

2. By the terms of the contract, it would seem that the measure was to be in the solid,— the "rip rap" to be fifty cents per *cubic* yard.

3. It is a question of fact, and should be found by the auditors. *Eaton* v. *Smith*, 20 Pick. 150.

J. A. Vail for plaintiff.

It is claimed, that plaintiff should not be allowed for the amount of "rip rap" wall in the bank or wall, but only for what the material would amount to in cubic yards in the solid. To which we say,— 1. That the contract does not provide for any such manner of computing the amount of plaintiff's work. 2. That there is no usage or custom, general or local, proved in this case, which can avail the defendants in the position taken by them. 3. The auditors find nothing in the testimony, aside from the written contract and the subject matter of the contract, that could aid them in determining the proper measurement of the "rip rap," which leaves the matter where the contract leaves it, &c.

BY THE COURT. The only question in the present case, is in regard to the proper mode of estimating that portion of the plaintiff's claim which is for "rip rap." It is very possible the parties might have entertained different ideas in regard to that point, at the time of entering into the contract. We can only determine the matter, from the terms of the written contract, with such knowledge and experience, as we have, in regard to the subject matter, which is necessarily imperfect.

The terms used are exceedingly indefinite. They could scarcely be more so. But the term "rock" and "earth" naturally apply to *excavation*. And from the known practice of estimating such work, by the size of the pit or excavation, there could be little

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doubt the parties so used them. But the term "rip rap," as we gather from the report and the argument, and our own very limited knowledge upon the subject, only applies to the stone when laid into a kind of *shingling*, upon the slope of the dirt embankment, at such points as it is likely to be washed by water. In other words, "rip rap" is a kind of wall.

This being so, it seems to us that the word cubic yard, as applied to this subject matter, would more naturally have the same signification as other measures of *solidity*, when applied to wall. The term *perch* is very common, as applied to erections in masonry, whether more or less free from interstices, and it is a solid measure as much as a cubic yard, or any other term of solidity. But we suppose it is a measure to be applied to the structure, without regard to the interstices. If this were not so, it would become necessary to have some general ratio of deduction, on that account, or else to obtain the specific measure of each stone, which could only be done, with perfect accuracy, by immersing each particular stone in some fluid, and then measure the elevation of the fluid by a guage. The truth is, if the interstices are to be deducted, it could only be done in practice, by some average ratio of deduction.

If the term *embankment* had occurred in the contract, instead of "dirt," it would certainly entitle the party to have his dirt measured in the embankment, instead of the excavation, although measuring twice as much. For the stipulation would then be for each cubic yard of embankment. But "dirt" being indefinite, we are at liberty to resort to the usual custom.

But here the term used, seems to imply pay by the cubic yard, for the "rip rap," i. e. after the stone is fitted, and laid into wall. And the auditors seem to have found it impossible to find any general usage, or uniform custom, which should control the mode of measurement. It seems to us, therefore, that the county court put the true, or at most, the more obvious construction upon the contract, and the judgment is affirmed.

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CHITTENDEN COUNTY,

December Term, 1851.

[Continued from *ante*, page 88.]

S. S. Jackson & Co. *v.* Eugene Bissonette.

Book Account. Consignor and Consignee.

The defendant consigned a quantity of cheese to the plaintiffs, as commission merchants, in Boston, Massachusetts, and they sold a portion of the same on the 12th of September, to Henry Dean & Co., and on the 20th day of said September, the plaintiffs rendered a full account of their dealings with the defendant, and struck a final balance of "net proceeds," deducting commissions, and all other charges, stating "Amount to your credit $801.66, which you can draw for at "sight," adding, "when you write us again, please say if you wish us *to remit* "*to you*, or you draw on us for the amount." After the receipt of this statement the defendant drew upon the plaintiffs, and they paid a large portion of this sum or balance. Dean & Co., before the plaintiffs had collected of them the amount due for the cheese sold to them, became insolvent and went into bankruptcy, but the plaintiffs did not inform the defendant of the fact of their indebtedness or bankruptcy, until nearly thirty days after their failure. *It was held*, upon these facts, that there was an actual, positive and unqualified assumption by the plaintiffs, of the sale to Henry Dean & Co., as cash in hand.

It was also *held*, that a payment made under such circumstances, the money is not to be recovered back, except upon the clearest case of fraud, on the part of the defendant, or mistake of facts, by plaintiffs; not the mistake of future contingencies, but present, and important facts, forming the basis upon which plaintiffs made the payment.

And it was also *held*, that an express promise of the defendant to refund the money thus paid by the plaintiffs, would be a mere *nudum pactum*.

Book Account. The case was recommitted to the auditor, by this court, at a former term, for a more particular statement of facts, who reported, substantially, the following facts:—

The plaintiffs were, during the year 1845, and ever since that time have been, commission merchants in Boston, Massachusetts. That the defendant, during the time aforesaid, resided in Charlotte, Vermont, and was engaged in mercantile business. That about the 5th day of September, 1845, the defendant consigned to the plaintiffs a quantity of cheese, consisting of fifty-five casks, 11,817

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pounds, net weight, and by letter, dated the 5th day of September, 1845, apprised the plaintiffs of said consignment, and in said letter directed the plaintiffs to dispose of said cheese to the best advantage; said letter was received by plaintiffs three days after its date, and said cheese on the 11th day of September, six days after the date of said letter. On the 12th day of said September, the plaintiffs sold and delivered forty-one casks of said cheese to Henry Dean & Co., a firm then doing business in said Boston, at the price of $565,93.

That said sale to said Dean & Co. was what then was and now is termed, by merchants in Boston, a "sale for cash." And in such case, it is the custom for the vendor to wait a reasonable time for the purchaser to examine the goods and bills, and see that all is right, and then to call on the vendee for the cash.

That one of the plaintiffs called on Dean & Co. several times before the 20th of September, and was put off by excuses, one of which was, that there was error in the *tare;* on said 20th of September one of the plaintiffs rectified all mistakes with said Dean & Co., and requested them to pay for said cheese; they said it was not convenient to make payment on that day. That subsequently, and between the 20th of September and the 7th of October, one of the plaintiffs called twice on Dean & Co. for payment, and was told the last time of calling, that they need not be to the trouble of calling again, as they would soon bring the money to plaintiffs, which they never did; and that on or about the 20th day of September, said Henry Dean & Co. in fact failed, and after that time did not pay any debts in full, and on the 6th day of October next afterwards, said Dean & Co. went into bankruptcy under the insolvent laws of Massachusetts. That the failure of said Dean & Co. was not generally known in Boston until the 7th or 8th of October, and the plaintiffs first knew it on the 7th, at night.

That the plaintiffs, on the 20th day of September, 1845, made out a statement of their dealings with the defendant, and sent the same with a letter to the defendant. That part of the letter referred to, is as follows:—

"Boston, Sept. 20, 1845.

"Mr. E. Bissonette,

"Dear Sir: Annexed please find account, sales of fifty-five "casks of cheese. * * * * * * * * * *

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"The balance your due, is eight hundred and one dollars and six-
"ty-six cents, which you can draw for at sight, and when you
"write us again, please say if you wish us to remit to you, or you
"draw on us for the amount. * * * * * * *

"Very Respectfully, yours, &c.,

(Signed) "S. S. JACKSON & Co."

That when said forty-one casks of cheese were sold and delivered to said Dean & Co., said Dean & Co. were made debtor to the defendant therefor on the books of the plaintiffs, and the entry so remains upon said books. The plaintiffs first informed the defendant of the failure of said Dean & Co., by letter dated the 3d, and mailed the 4th day of November, 1845, at Boston. The defendant, on the 12th and 13th days of November, was at Boston, and there had a conversation with the plaintiffs about proving the claim of defendant against said Dean & Co. under the bankrupt proceedings, the defendant not being a resident of Massachusetts; upon which one of the plaintiffs consulted an attorney, and was advised that unless proved, the debt would be barred and lost. Whereupon the defendant directed the plaintiffs to do with his said debt, as they would do with their own,— to do the best they could with it.

That on the 7th day of October, 1845, said Dean & Co. were suffered to overdraw, at the North Bank, in Boston, their account to the amount of $2,500.

It also appeared, that at the time of the sale of said cheese to said Dean & Co., the defendant did not know of the existence of the custom in Boston, in relation to "sales for cash," but had been informed that such custom existed among merchants, in the city of New York.

There are other facts reported by the auditor, but sufficiently appear in the opinion of the court.

E. J. Phelps and *L. E. Chittenden* for plaintiffs.

1. The sale made by plaintiffs was in conformity with their instructions. The cheese having been consigned to them as factors, under general instructions to dispose of it "*to the best advantage*," not restricting them to a sale for cash only, they were justified in selling either for cash or on a reasonable credit, provided they followed the general usage of the market, and used ordinary care

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and prudence. *Goodenow* v. *Tyler*, 7 Mass. 36. *Clark* v. *Van Northwick*, 1 Pick. 343. *Dwight* v. *Whiting*, 15 Pick. 179. *McKinstry* v. *Pearsall*, 3 Johns. 318. *Van Allen* v. *Vanderpool*, 6 Johns. 69. *Leverick* v. *Miegs*, 1 Cow. 645. 2 Kent's Com. 622.

Nor is it material whether the sale was, in a legal sense, a sale for cash, or upon credit. Either would have been strictly within their instructions and their duty.

The only importance of the evidence as to the usage, is to show that this sale was in conformity with the general usage of merchants, which the law requires. Especially as that usage affords the measure of the diligence required.

2. The sale was made with all reasonable care and prudence, and the plaintiffs were guilty of no negligence in conducting it, or in attempting to collect the proceeds.

3. Neither the plaintiffs letters, nor the payment by them of defendant's draft, can be treated as an assumption of Dean & Co.'s debt. To amount to such an assumption by the factors, it must clearly appear that it was their intention to make the debt their own. 1 Am. Lead. Ca. 483 and cases cited. *Winchester* v. *Hockley*, 1 U. S. Cond. 416. *Robertson* v. *Livingston*, 5 Cow. 473.

The payment of the draft amounts to nothing, in the absence of any intention to assume the debt. Such payments are continually made in the ordinary course of business, and may always be recovered back if a loss comes without fault on the part of the factor. *Dwight* v. *Whitney*, 15 Pick. 179. *Corliss* v. *Cummings*, 6 Cow. 437.

S. Wires and *W. W. Peck* for defendant.

1. The plaintiffs are chargeable with the debt of Dean & Co., on the ground of not exercising due care to collect it.

2. They represented to defendant that the price was paid, and authorized him to draw accordingly. He did so, and they must be treated to have assumed the debt. *Consequa* v. *Fanning*, 3 J. R. 587. *Oakley* v. *Crenshaw*, 4 Cow. 250.

The opinion of the court was delivered by

REDFIELD, J. This was an action of book account, and was recommitted to the auditor by this court at a former term, for a more particular statement of facts. The case now stands upon

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the last report, which the auditor says is intended to embrace all the facts in the case.

The case was heard at the present term, upon the question of law arising upon the report and upon a motion to recommit, for the report of further facts in relation to the plaintiffs having assumed the debt of Dean & Co., at their own risk, as cash in hand. The decision of the court will be more briefly stated upon both points at the same time.

The case upon the report, was decided mainly upon the plaintiffs having assumed the debt of Dean & Co., by the letter of the 20th of September, 1845, their subsequent indulgence to Dean & Co., and especially, by the actual payment of a large portion of the balance. The important facts bearing upon this point in the case, are that this was confessedly a cash sale. The defendant had no knowledge of any custom among commission merchants in Boston, to make delivery of goods in such cases, before the actual payment of the money, although he had learned some such custom in New York. The sale was made on the 12th of September. Three days after, the plaintiffs called upon Dean & Co. for the money, thus showing that the plaintiffs considered it their right to require it at that time. But they were put off by sundry shallow subterfuges, until the 20th of September, when all evasions being removed, all parties regarded the money as due, the amount being definitely ascertained. At this time the plaintiffs render a full account of their dealings with defendant, and strike a final balance of "Net Proceeds," deducting commissions and all other charges, stating "*Amount to your credit* $801,66," "*which you can draw for* AT SIGHT," adding, "when you write us again, please say if you wish us to *remit to you*, or you draw on us for the amount."

It certainly requires some degree of sagacity, and refinement of criticism, to conjecture any ground of doubt of this being an actual, positive and unqualified assumption of the sale to "Henry Dean & Co." "$513,88," as cash in hand. It so appears upon the account rendered. From anything which appears upon the account rendered, or the correspondence, the cash had actually been realized upon this, as much as upon any other portion of the account.

This sale to Dean & Co. consisted of six different casks of cheese, with distinctive marks upon each to indicate the persons of

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whom the several casks were received by defendant, as is obvious from the marks themselves, which are carried into the plaintiffs' account rendered to defendant, and obviously for the purpose of enabling him to give an account of them, to those of whom he received them, whether upon commission or otherwise. Thus showing very clearly that the plaintiffs understood that the effect of this account, rendered by them, would be to induce the defendant to make *his* final settlement with *his customers* or *consignors*, for the several casks, showing in the most unequivocal manner, that they at the time regarded it as a final assumption of the debt of Dean & Co. *as cash in hand*. Indeed any other view of the subject, seems to us, little short of absurdity. So much so, that we can scarcely conceive how the plaintiffs ever conceived sufficient effrontery to claim to have it treated in any other light. Such a claim, seriously put forth in any metropolis of trade, could only have exposed the claimant to ridicule or contempt. And the plaintiffs very likely, at home, would have pocketed the loss in silence, out of self-respect. For it seems they could not summon sufficient courage to make any demand upon the defendant until about thirty days after Dean & Co. had notoriously gone into bankruptcy.

And this view of the subject is confirmed by all the subsequent conduct of the plaintiffs. They paid the defendant's drafts drawn upon them by their own direction, to the amount of nearly $800, on the 22d of Sept. and the 7th of October. They continued to call upon the firm of Dean & Co., and suffered themselves to be put off, from time to time, by such pitiful evasions, as sinking men are fain to resort to, until Dean & Co., went into bankruptcy on the 7th or 8th of October, without giving the slightest intimation to defendant of the delay, which is certainly grossly negligent and altogether unaccountable, if they all the time considered the debt under the control of the defendant, and themselves merely agents for its collection. And of the same character is the additional fact that they gave no intimation of the failure of Dean & Co. to the defendant, till nearly a month after the event, on the 3d day of November, which was probably upon the receipt of an additional draft, when the sense of suffering, in paying the balance of the loss, drove them to the desperate resort of protesting the debt which they had, besure, voluntarily assumed, nearly two months before. And when the parties meet in Boston, a few days subse-

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quent to this time, the plaintiffs make no claim, as we learn, to have the money, which they had paid upon the drafts, refunded; each seemed to stand mutely upon his own reserved rights then, whatever that might be, in the final event. Under this complication of facts, all tending to show the unqualified assumption of the debt of Dean & Co., and the actual payment of a considerable portion of it by plaintiffs, we cannot regard these payments as creating any debt on the part of the defendant. It was clearly regarded at the time, by both parties, as the payment of a debt by the plaintiffs. And in such case the money is not to be recovered back, except upon the clearest case of fraud on the part of defendant, or mistake of facts by plaintiffs; not the mistake of future contingencies, but present and important facts, forming the basis upon which the plaintiffs made the payment. Nothing of this is pretended.

Upon a question of this kind, which is a good deal matter of intention, and the facts being in writing, or conceded, become matter of law, very little aid can be expected from reported cases, unless there is a very close correspondence in the facts. Each case, in its facts, will be peculiar; it is the leading principle which is to govern all cases. But the case of *Oakley* v. *Crenshaw*, 4 Cowen 250, is very similar to the present, and certainly not more clearly indicating an intention to assume the risk of the collection. There the factor said, the money is not all received, but "I am desirous not to have the account stand open, therefore you may draw for the net balance." And the court here regarded it as an absolute assumption of the debt, which could not be repudiated upon the after failure of the debtor. If money paid over under such circumstances could be recovered back, nothing could ever be settled, as is said in *Consequa* v. *Fanning*, 3 Johns. Ch. 587. In *Robertson* v. *Livingston*, 5 Cowen 473, the note of the factor is made payable after the debt to the principal would fall due, thus showing an *intention* to have one debt meet the other. It is said in Smith's Mercantile Law, p. 106, "If indeed the factor, after the sale, remit his own note or acceptance to the principal, for the amount of the proceeds, he will be liable on that, whether employed under a *del credre* commission or not, and whether the vendee be or be not solvent. For, by giving such an instrument, he lulls all the suspicions of his employer, and causes him to dismiss all care

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about the solvency of the purchaser." Citing *Lefever* v. *Lloyd*, 5 Taunton 749. *Simpson* v. *Swan*, 3 Camp. 291. *Goupy* v. *Harden*, 7 Taunton 159. That is precisely the present case, except that here most of the money has been actually paid over. Now to the extent of the actual payment, there is not, in the present case, the remotest ground of belief that either party, at the time of payment, had the remotest apprehension that in any event it could ever be reckoned an advance, or in any manner formed a debt on the part of defendant. The case of *Dwight* v. *Whitney*, 15 Pick. 179, has no proper bearing upon the present case. It merely shows that carrying the sale into the account, to the credit of the consignor, does not necessarily fix the factor with the payment of the apparent balance of the book. The true rule upon this subject is, as it seems to me, laid down very briefly and very pertinently, in *Shaw* v. *Picton*, 4 B. & C. 715. 10 E. C. L. R. 443, in the language of BAYLY, J, "It is quite clear that if an agent (employed to receive money, and bound by his duty to his principal, from time to time, to communicate to him whether the money is received or not,) renders an account from time to time, which contains a statement that the money is received, he is bound by that account unless he can show that statement was made unintentionally, and by mistake. If he cannot show that, he is not at liberty afterwards to say that the money had not been received and never will be received, and to claim reimbursement in respect of those sums for which he had previously given credit. I think that when an agent has deliberately and intentionally communicated to a principal that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again."

This view of the case settles the matter of the plaintiffs right to recover back money, which he has paid towards an acknowledged balance in his hands, on account of sales of property consigned to him. For the whole balance claimed, is of this character. How far the defendant is entitled to recover the remainder, we have not felt disposed to strain the matter very severely. The report being drawn up, with a view chiefly to present the plaintiffs claim to recover the balance claimed by him, and the contingency of defendants being entitled to recover a balance, not apparently being much upon the mind of the triers of the fact, there is nothing in

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the report to show that the defendant is or is not in any different circumstances from what he would have been, by reason of the plaintiffs having acknowledged this balance in their hands, the plaintiffs promise to pay the balance must still be regarded as a mere naked promise of payment, without consideration, which is revocable until performed. It is quite probable, facts exist from which it might be made to appear that he had dealt differently with his customers, in consequence of this balance being acknowledged in plaintiffs' hands, and before he was informed such was not the fact, and if so, he would be entitled to recover the balance. But the litigation has been so long protracted, that we have not deemed it expedient to recommit the report, upon this point.

In regard to recommitting the report, to find how far the defendant has acknowledged his obligation to refund the money claimed by the plaintiffs, it would be useless, as we should regard an express promise to refund this money, as a mere *nude pact.* And, as this point has been urged with some degree of zeal, we may be allowed to say, that to our minds, it is altogether incomprehensible how any one can view the conduct of the plaintiffs, in the whole transaction, as falling short of the most culpable and gross negligence, in making or in not making these collections, long before the failure of Dean & Co., when from the mere fact of that firm, on the very last day of doing business, being permitted to overdraw their bank account $2500, it is obvious that any reasonable degree of pertinacity on the part of the plaintiffs towards Dean & Co., (half as much as they now exhibit towards defendant,) would have secured the payment of this balance by Dean & Co.

The motion to recommit is overruled and judgment on the report for defendant to recover his costs.

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FRANKLIN COUNTY,

January Term, 1852.

[Continued from *ante*, page 189.]

Homer E. Royce *v.* Elijah Hurd.

Statute of limitations. The act of 1797 *and* 1832, *considered. Evidence.*

A claim that arose under the statute of limitations passed in 1797, but not being barred, before the passage of the act of 1832, is, in terms, controlled by that act, after it took effect.

And it was held, that the distinction between the act of 1797 and 1832, is, in fact, this.— that in the former, if the statute began to run, it continued to run, while under the latter, the debtor must either remain in the State, or leave sufficient known property here, out of which his debt could be satisfied, or else the statute would not produce a bar.

And this property must be estate real or personal, unembarrassed, and which is liable to be levied upon for the satisfaction of the debt; and this estate should so continue, during the whole period of the debtor's absence from the State, in order to continue the operation of the statute, or the statute of limitations would cease to run.

Probate proceedings, where the title of land comes in question, are required by statute to be recorded in the town clerk's office, as much as in the probate office, and unless so recorded they are not admissible as evidence of title.

Assumpsit on a promissory note, alledged to have been executed by the defendant on the 31st day of August, A. D. 1832, for eighty-four dollars and forty cents, payable to Benjamin Moses, or order, in one day from date, with interest, and by him indorsed to the plaintiff. Pleas: 1. Non assumpsit. 2. The statute of limitations. Replication and rejoinder, and trial by jury.

The plaintiff, in answer to the defendant's first plea, having first proved the loss of the note pending the suit, introduced evidence tending to prove the execution of the same by the defendant, and the indorsement thereof by said Moses, the payee; and the contents of the note and purport of the indorsement corresponding with the description given in the declaration.

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The evidence also tended to prove, that from the time of the date and execution of said note, and a little before, the defendant had been constantly absent from this State, till after the commencement of this action, with the exception of his once or twice passing through the town of Franklin. There was no evidence tending to show that his so being in the State, was known to the holder of said note, so that he could have arrested his body, or obtained personal service on him.

The defendant, in support of the issue on his part, under his second plea introduced a deed from Samuel Hubbard to Ebenezer Marvin, dated in August, A. D. 1791, of lot number 1, in range 10, in Huntsburgh, (now Franklin,) also a deed from Sarah Marvin to Artemas Holden, of a portion of said lot, and including the part described by defendant in his rejoinder; and also a deed from said Holden to the defendant, of the same, dated November 7th, A. D. 1826. He also offered the probate and probate records of the will of Ebenezer Marvin, to which the plaintiff objected on the ground that neither said will nor an attested copy thereof had ever been recorded in the town clerk's office of the town of Franklin; but the objection was overruled, and the probate and probate record admitted.

He also introduced evidence tending to show, that before 1800, Ebenezer Marvin took possession of said lot number 1, and he and his widow, Sarah Marvin, occupied the same until she deeded to Holden; that said Holden possessed said land under said deed from Sarah Marvin, until he deeded to the defendant; and that the defendant occupied and possessed it after the execution of said last deed for several years, and until after the execution of the note described in the plaintiff's declaration; and that the defendant, while he resided in this State, resided on said land; and that said land had afterwards generally borne the name of the Hurd place.

The evidence also tended to show, that after the defendant went into the possession of said place, and down to the commencement of this suit, some portion of the people in the vicinity, spoke of it as belonging to the defendant, and so considered it. That in 1837, or 1838, one Dan Rublee, who was then the holder of the note now in suit, directed a writ to be made upon said note, against the defendant, returnable before a justice of the peace, and said place to be attached on said writ, which was accordingly done.

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It appeared that there was over one hundred dollars due on said note, at the time said justice writ was made out; that no personal service was made on the defendant, and no notice was given him of the pendancy of said suit, and that the said suit was not continued on account of defendant's absence from the State. The testimony also tended to show, that if any judgment was rendered in said suit, it was by default. That said justice, before whom said writ was made returnable, never made any record of said judgment, and that said justice died before the commencement of this suit.

The plaintiff then introduced in evidence, the record of a power of attorney, from the defendant to his wife, Maria Hurd, (therein styled Maria Hieliker, wife of defendant,) dated May 12th, 1834, and a deed of said place, with some adjoining land, executed by said Maria Hurd to one William Crane, dated February 19th, 1835, and introduced evidence tending to show that immediately after the execution of said last deed, said Crane, by his tenants, took possession of said place, and occupied it, claiming to be the owner, and continued so to occupy without interference or objection from the defendant down to the commencement of this action.

That during said period, said place described in the defendant's rejoinder, was set in the grand list of the town of Franklin, to said Crane, and that he paid all taxes on the same, and it was generally reported and considered to be the property of the said Crane.

Upon the evidence thus introduced the plaintiff contended, that said place described in defendant's rejoinder, ought not to be treated as known property of the defendant, which the holder of said note was bound by law to attach, and especially that it ought not to be so treated after said deed and possession, taken and held by said Crane, as aforesaid.

But the court decided, and so instructed the jury, that if the defendant occupied and resided in the premises described in the rejoinder, while he resided in this State, and the holder of the note in the summer of 1838, directed said premises to be attached by virtue of a writ on the note, the verdict should be for the defendant, and a verdict was returned accordingly.

To all which decisions and directions of the court, the plaintiff excepted.

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H. E. Royce and *H. R. Beardsly* for plaintiff.

1. We think the court erred in admitting the probate and probate records of the will of Ebenezer Marvin. Stat. (Slade's Comp.) Chap. 44, § 86. Revised Stat. Chap. 46, § 37. *Ives* v. *Allyn*, 12 Vt. 587.

If the probate and probate records of a will can be given in evidence to prove the title to real estate, without having first been recorded in the town clerk's office of the town in which such real estate is situate, it is not easy to assign to the statute any useful or sensible construction. *Harrington et al.* v. *Gage et al.*, 6 Vt. 532.

2. The defendant was bound under his second plea, to show that he owned the piece of land described in his rejoinder; and that this fact was generally known in the neighborhood, or to the holder of the note in suit. And this ownership and the knowledge of it, we insist must have existed for the period of six years after the note became payable. *Hill* v. *Bellows*, 15 Vt. 727. *Wheeler et al.* v. *Brewer*, 20 Vt. 113.

3. If the court should be of opinion, that the defendant showed that he acquired such a title to the land under his deed from Holden, that plaintiff was bound to attach it, then we insist that the defendant did not continue to own the land, within the meaning of the statute, after the deed to Crane, February 19th, 1835. That deed doubtless was defective; but it was founded on a full executed promissory consideration, and the defendant either gave possession, or acquiesced in its being taken, under the deed, and being held for a long period. The defendant, therefore, became bound in equity to complete the title in Crane. And we insist, that the record of the deed from defendant to Crane, was constructive notice of the rights which Crane had then. But if the record was not constructive notice, we believe the law is well settled that possession under such a deed is *legal* notice, which cannot be *explained away or rebutted*. *Governeur* v. *Lynch*, 2 Page 300. *Kidder* v. *Lafferty*, 1 Whea. 304. *Leighner* v. *Mooney*, 11 Watts 412. *Hardy* v. *Summers*, 10 Gill & J. 316. *Webster* v. ———, 6 Maine Rep. 256. *Knox* v. *Plummer*, 7 Maine Rep. 464. *Knox* v. *Jackson*, 6 Wend. 213. *Parks* v. *Jackson*, 11 Wend. 442. *Rublee* v. *Mead*, 2 Vt. 544.

Our courts, in construing the statute, have properly held, that

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the creditor was only bound to sue when actual collection, or something could be realized on the demand. *Hall* v. *Brewer*, 15 Vt. 727. *Wheeler et al.* v. *Brewer*, 20 Vt. 113.

Finally, we insist that the defendant's creditors were never bound to attach this land, in order to prevent the effect of the statute, though they may have had full knowledge of all that appeared on the trial below, and especially after the defendant deeded to Crane in 1835.

C. Beckwith for defendant.

1. The probate and probate record of the will of E. Marvin, was properly admitted as evidence in the court below. *Ives* v. *Allyn*, 13 Vt. 629.

2. The evidence shows that the defendant had an indisputable title to the premises mentioned in the rejoinder in 1832, at the time the cause of action accrued. His title remained without any embarrassment until February, 1835. The statute, therefore, began to run, and when it once begins to run, it continues so to do, notwithstanding any impediment which may occur. By the same rule of construction, if the defendant had had no known property within the State when the cause of action accrued, the statute would not have begun to run, until he came into the State. Any other rule would make the statute of 1797 run when the defendant happened to be within the State, or to have property here, which would be contrary to the long and well settled construction of the court. Statute of 1797, § 10. Slade's Ed. p. 291. *Lowry* v. *Keyes*, 14 Vt. 66. *Wheeler* v. *Brewer*, 20 Vt. 113.

3. The statute of 1832 does not apply to this case. It was only intended to prevent the operation of the statute, when the defendant should leave the State after the cause of action accrued.

But admitting the act of 1832 to apply to this case, it must receive the same construction as the act of 1797. The statute would continue to run if the defendant had known property when he left the State, and having once begun to run would continue so to do.

4. The power of attorney from the defendant to Maria Hurd, was void, also the deed from Maria Hurd to William Crane. As the invalidity of these instruments appeared upon their face, they created no cloud upon the defendants title. *Simpson* v. *Lord Howden*, 3 M. & C. 97.

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The jury have found, that the owner of the note knew that the defendant was the owner of the premises in the summer of 1838, and the present plaintiff has attached them upon the writ in this case. If nobody in interest has been deceived by the power of attorney and the deed to Crane, it would be singular to hold that they suspended the operation of the statute because somebody might have been deceived by them.

The opinion of the court was delivered by

REDFIELD, J. In regard to the statute of limitations, this case arose under the act of 1797, but not being barred before the passage of the act of 1832, is, in terms, controlled by that statute, after it took effect. The terms of the statute are, "against whom there "*is or may be* any cause of action;" thus, *ex vi termini*, including all *subsisting causes of action*, at the time the act took effect.

The construction of this statute seems pretty well settled by the decisions had under it, so far as this case is concerned. The property, which it is necessary for the debtor to have, so as to preclude the plaintiff from deducting the absence of the defendant from the State, in computing the term of the statute bar, must be property sufficient to satisfy such a portion of plaintiff's debt, as fairly to justify the institution of legal proceedings, for the collection of the debt. The creditor is not bound to sue merely to keep his debt alive, as he would be if the debtor were within the State, inasmuch as the judgment which he could obtain, could only bind the property attached, or within the jurisdiction, unless the debtor volunteered to appear in the suit. WILLIAMS, C. J., in *Hill* v. *Bellows*, 15 Vt. 733, declares, that the property must be sufficient to satisfy the whole debt. And it seems to me such is the reasonable import of this portion of the statute of 1832. "Shall not have "known property, within this State, which could, by the common "and ordinary process of law, be attached," seems to imply, that it shall be such property, in such position, and to such extent, as to enable the party to take it, to some beneficial purpose, i. e., to satisfy his debt; for beyond that, or without that, it would afford no excuse for the absence of the debtor himself. That the party could have secured property enough to enable him to obtain a judgment at his own cost, which he could not satisfy in this jurisdiction, for want of any thing to levy upon, and which would be of

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no avail in any other jurisdiction, is certainly no excuse for the absence of the debtor, and no sufficient reason why the statute of limitations should be suspended.

The case of *Wheeler* v. *Brewer*, 20 Vt. 113, seems to decide sufficiently, that the defendant's ownership of the property must be so notorious, as to enable the creditor, by the use of common diligence, to find and attach it. It must, too, no doubt, be estate, unembarrassed, and which is liable to be levied upon for the satisfaction of the debt. It is, therefore, questionable how far the creditor would be bound to regard a merely equitable title, or an incumbered title, to real or personal estate, in his debtor.

And it would *seem*, that this estate should so continue during the whole period of the debtor's absence from the State, in order to continue the operation of the statute. For the statute seems, in terms, to provide that absence from the State, (not having known property, which might be attached,) shall be deducted from the term of limitation fixed, of course, when this property ceases, or ceases to prove the essential requisites implied in the statute, the absence *must* be deducted. This very point, with reference to a similar statute, came under consideration in the case of *Dow* v. *Sayward*, 14 N. H. 271, and it was there considered, that the property must continue, or the statute of limitations would cease to run. And there seems to us to be this distinction between the act of 1797 and 1832, that in the former, if the statute began to run, it continued to run, while under the latter, it seems to have been the purpose of the statute, to arrest the operation of the statute whenever the debtor was absent from the State, not having known property, &c. In short, the debtor must either remain in the State, or leave sufficient known property here, out of which his debt could be satisfied, or else the statute would not produce a bar. This is certainly far more just and reasonable than the earlier statute upon the subject. But it is perhaps not needful absolutely to determine this point here. And whether the pleadings are in form, to raise all these questions properly, it is not needful here to inquire. It would seem, that the case will have to go back, upon the admission of the probate proceedings, not having been recorded in the town clerk's office. The statute is express in requiring such record, and this court in *Harrington* v. *Gage*, 6 Vt. 536, held such record indispensable to a recovery, in ejectment. And we

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do not well perceive how any distinction can fairly be made, between the effect of such proceedings before recorded in the town clerk's office, in an action of ejectment, and other actions, where the title of land comes in question. The statute requires the record in the town clerk's office, as much as in the probate office. How far the defect may be now supplied, it is not needful to inquire. Whether the proof being perfected, the title, and its notoriety will not also be able to be made out, will hereafter depend, to some extent, probably, upon a different state of evidence.

Having made these suggestions, to enable the parties to present the case in the proper form, should it be further litigated, we scarcely deem it expedient to go very much into the questions of title raised at the former trial.

The title to the land would seem to have been sufficiently in the debtor, and this sufficiently known to the creditor, before the attempted conveyance to Crane. This conveyance seems to be admitted, on all hands, to have been altogether defective, as a legal conveyance. How far it created such an equity in Crane, as to bring it without the terms of the statute, may properly admit of some question. There are so many other grounds upon which it seems desirable to have a reconsideration of the case, that we have not spent much time upon this.

Judgment reversed and case remanded.

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ADDISON COUNTY,

JANUARY TERM, 1852.

[Continued from *ante*, page 180.]

DANIEL NIMBLET *v.* LUCY CHAFFEE.

Probate Court. Appeal from decree refusing to appoint a guardian, in case of alledged insanity. Motion to dismiss.

Where the friends and relatives of an alledged insane person, made application to the probate court to appoint a guardian over the alledged insane person, and the probate court upon hearing the application, made a decree refusing to appoint a guardian; and one, who petitioned the probate court with others, as friends and relatives of the alledged insane person, appealed from the said decree, it was held, on motion to dismiss the said appeal, that the friend or relative, in the case where no guardian is appointed, and the guardian, in the case where the decision is that the ward is no longer a proper subject of guardianship, are not, by the provisions of the statute, entitled to an appeal.

APPEAL from a decree of the probate court refusing to appoint a guardian over an alledged insane person.

In the county court the appellee moved to dismiss said appeal, on the ground that said court has no appellate jurisdiction of the case. The county court sustained the motion and dismissed the appeal. Exceptions by appellant.

Geo. W. Grandy for appellant.

Barber & Bushnell for appellee.

BY THE COURT. This is an appeal from the probate court, from a decree refusing to appoint a guardian over the appellee, an alledged insane person, by one who petitioned the probate court, with others, as friends and relatives of the appellee. The county court, on motion, dismissed the appeal. The question whether the case is appealable on the part of such friends and relatives, is now to be revised.

The statute expressly provides, that if the decision is against

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the alledged insane person, or when he shall petition to be discharged from guardianship, and the decision shall be adverse to his petition, he shall be allowed an appeal, "but no bond shall be required on granting such appeal."

It is claimed, on the part of appellant, that this provision is merely for the purpose of allowing one party to appeal without giving a bond. But the form of the enactment precludes any such construction. The chief purpose of the enactment seems to be to give the appeal to the alledged insane person, and as we think, by implication, to deny it to the other party, adding, "but no bond shall be required," which is indeed another important purpose, but the form of the enactment seems to show that this was not the prominent idea in the mind of the person drawing the bill, or in the legislature in passing it.

We think, therefore, that according to the maxim of *expressio unius est exclusio alterius*, it must be considered, that the friend or relative in the one case, where no guardian is appointed, and the guardian in the other, where the decision is that the ward is no longer a proper subject of guardianship, shall not have an appeal.

And we think there is sound reason in this distinction. The friends and relatives in one case and the guardian in the other, have no such interest as is ordinarily required to entitle one to appeal from a decree of the probate court. They have no present vested pecuniary interest, in creating or continuing the guardianship. And no interest or right of theirs is concluded by the decree. A new proceeding may be instituted, at any time, when it is believed the evidence of the insanity has become more convincing. And the friends, who deem a relative insane, when others do not, as is not seldom the case, where property is in expectancy, should be satisfied with the decision of the probate court, and ordinarily will be. And at all events, to allow an appeal and protracted litigation, at the caprice of any one of the applicants, however numerous, and of the guardian also, would become absolutely intolerable, to one accused of insanity, and not unlikely to produce such a state of mind.

It is said, the court ought not to presume against the interest of the appellant. But it is to be borne in mind, that the expectancy of an heir, or the apprehension of being ultimately compelled

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to mantain a lineal ancestor or descendant, is no present vested interest, which the law can recognize. Nor could the former, at common law, be assigned even. And no other possible interest is even suggested.

Judgment affirmed.

G. A. AUSTIN *v.* WILSON & CALKINS.

Indorsee and Indorsors. Protest. Non-payment. Evidence of demand and notice.

In an action, in favor of the indorsee, on a promissory note dated in New York, and made payable in Orwell, Vermont, where the indorsee resided, the maker and indorsors all residing without this State, the said note being protested for non-payment, at the Bank of Orwell. It was held, that the certificate and formal protest of a deceased notary were admissible as evidence of demand and notice.

It was also held, that it is not essential, that the entire record of the notary should be made at the very moment of the transaction, but it is sufficient if done within a few days, in the ordinary course of business.

ASSUMPSIT on a promissory note for $1,371,38, brought against the defendants as indorsors thereof. Plea, the general issue and trial by the court.

No question was made as to the signatures of the parties; and it was admitted that the defendants were partners at the date of the note, and from thence, up to the time of trial.

The plaintiff introduced the note, which was payable in "six months from date, at Orwell, Vermont;" and also offered in evidence the protest annexed to the said note. The defendants objected to the admission of the protest as evidence, and also to the certificate of the notary relating to the notice to the defendants, even if the protest should be admitted. The court overruled the objection and admitted the protest, with the certificate of notice, (signed) "William B. Martin, Notary Public," as evidence tending to prove the demand of payment, and notice to the defendants of non-payment.

It appeared that said William B. Martin was, at the date of

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said protest, a notary public residing in said Orwell, but had since deceased. The plaintiff also offered the memorandum on the back of said note, which was in the words following: "January 8, 1849, mailed notices to the indorsors as follows, to John B. Anger, Agent, Brooklyn, N. Y., and Wilson & Calkins, Ticonderoga, N. Y."

(Signed) "W. B. MARTIN, *N. P.*"

Also with proof that it was the hand writing of said Martin, accompanied with evidence tending to show that it was the custom of said Martin, when he demanded payment of a note and notified the indorsors, to make such memorandum of the fact on the back of the note at the time, and to fill up, in the course of a few days, the protest in form, (as said protest is filled up,) certifying that he had notified the indorsors in the body of the protest, and that said Martin was not accustomed to make any other record of the fact of demand and notice. To all which the defendants objected. The court overruled the objection, and admitted the evidence.

The plaintiffs also offered in evidence, the post-office books of the Orwell post-office, with the testimony of the person who made the entries therein, and of the post-master of Orwell, in January, 1849, whose testimony tended to prove that said books were regularly kept, and presented a true account of the letters mailed at the Orwell post-office in January, 1849; said books show an entry of four letters mailed for Ticonderoga, N. Y., on the 8th day of January, 1849, and that none were mailed for said place, after that date, until the 12th of January, 1849. The witness had no recollection of mailing the letters appearing upon the books. It also appeared by said books, that there was one letter mailed at said office for Brooklyn, N. Y., on the 8th day of January, 1849, and there was no entry of any letter mailed for said Brooklyn, after that date during said month of January. The post-master also testified, that at the time the note fell due, and before and after, the mail was carried from said Orwell to Ticonderoga, on Monday, Wednesday and Friday of each week, and no other days, that letters deposited in said office for said Ticonderoga as early as ten o'clock, A. M. on mail days, were sent the same day, but if deposited after that hour, would go in the next mail, according to the usage and custom of the office at Orwell. The defendants objected to the admission of the post-office books, and also to

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the testimony of the post-master and his clerk, but the court overruled the objection and admitted the books and testimony.

It appeared, that at the time the note fell due, and for a long time before, and ever since, the plaintiff resided in Orwell, and that the defendants lived in Ticonderoga, N. Y. It also appeared that Knowles Taylor, the maker of the note, never resided in Orwell, but that he lived in New York at the time the note fell due, and resided there before and since.

The signature of the said Martin to the protest, certificate and memorandum on the back of said note was proved.

The plaintiff also introduced evidence, under objection, tending to prove that the Farmers' Bank, of Orwell, was the principal place of business of the plaintiff, although he occupied a dwelling-house at Orwell, where he transacted a portion of his business. There was no evidence that he kept an office at the Bank, or occupied any apartment for his private business, separate from the business of the Bank. The plaintiff also offered and read in evidence, three letters from the defendants, with proof that they were in the hand writing of one of the defendants; said letters were dated on the 26th of March, and the 7th and 18th of July, 1849. The plaintiff claimed, that sufficient appeared in said letters to warrant the presumption, that defendants had received notice, or to operate as a waiver of notice. The said letters admitted the liability of defendants as indorsors, and asked for indulgence until they could collect of the parties primarily liable, without questioning the regularity of notice. It also appeared that plaintiff had notified defendants, at the previous term of the court, to produce the notice of demand and non-payment, but defendants neglected to produce said notice.

The defendants insisted, that the evidence in the case was insufficient to entitle the plaintiff to recover. The court rendered judgment for the plaintiff for the amount of the note and interest. To all which decisions and ruling of the court, defendants excepted.

C. D. Kasson for defendants.

H. Hale for plaintiff.

By the Court. This is an action in favor of the indorsee of

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a promissory note, dated in New York, and made payable to the order of John B. Anger, agent, who resided at the time, it would seem, in the city of Brooklyn, and indorsed by the payee, and the defendants successively. The note is made payable in Orwell, Vermont.

The only direct evidence of demand and notice is the noting for non-payment upon the note, by a notary public and his formal notarial protest, made at Orwell, the notary having deceased before the trial. The note fell due on the sixth day of January, 1849, and was then protested for non-payment, at the Bank of Orwell, where the same was lodged for collection, and where demand of payment was made by the notary, the maker of the note having never resided in Orwell, or had any place of business there, but residing and doing business in the city of New York.

The plaintiff's principal place of business in Orwell, was at the Bank of Orwell, although he kept house and transacted a portion of his business at his dwelling-house.

Three letters of the defendants were read in evidence by the plaintiff, written after the note fell due, in all of which the defendants recognize their liability upon the notes, as indorsers, without questioning the regularity of notice to them, but asking for indulgence until they can collect the money of the parties primarily liable upon the note.

The court, on this evidence, gave judgment for the plaintiff for the amount of the note.

The great question in the case, and indeed the only question perhaps, is whether the doings of the notary were properly admitted. For if properly admitted, then there can be no doubt, that taken in connection with the letters, they make out a sufficient case. If not properly admitted, the case should be opened, unless the letters also make a case, by themselves. The case is one large in amount, and every way important.

Some question was made in argument, whether in this case the formal protest could be in any event regarded as evidence, not being made at the very time of the transaction of demand and notice, as is probable, from the usual course of doing such business, and as was shown to have been the usual custom of the notary in this case. But there would seem no good reason, why if any part of the doings of the notary are to be shown by his record of the af-

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fair, we should not have the whole, which he esteemed the statement of what he had done, and especially the formal protest, which is the deliberate and solemn record or engrossing, so to speak, of the whole transaction. And in this case, the notary kept no other record. But the books show, that in all cases where the notary keeps a book of records of his doings, the book is admissible after his death.

In the case of a foreign bill the notarial protest is only evidence of a demand and protest for non-payment, at common law, as this is all which properly belongs to the protest, and proof of notice to other parties, is to be shown by the testimony of the notary or other proof, except that in New York and some other States, the certificate of the notary is made proof of notice to the other parties, by special statute. 3 Kent's Com. 115. Chit. on Bills (1836) 642. But in regard to a promissory note, such protest is not evidence, ordinarily, upon either point.

But this evidence is not dependent upon any rule of evidence which applies to the case of a protest, while the notary is living.

1. For in the case of a promissory note, even drawn in one State and payable in another, and indorsed by persons residing in different States, it could scarcely be contended, that a notarial protest is indispensable in case of non-acceptance or non-payment, as is requisite in the case of foreign bills. The contrary has always been held in England and this country. Promissory notes even after indorsement, follow the law of inland bills of exchange in this respect, where protests are allowed, as evidence of claiming special damage and for convenience in practice, but are not regarded as indispensable to charge the indorser, or as evidence, except for special objects, and under special circumstances.

So that upon both these grounds, the notarial protest is not evidence, while the testimony of the witness may be had. It must therefore be referred to the head of an entry, made by a person since deceased, if admissible upon any ground.

And here it must be confessed the cases seem to have gone a good deal upon the ground of the necessity of each case, in order to prevent a failure of justice. But this necessity is not the exigency of the particular case, but of a class of cases where it is supposable no better evidence exists of particular facts essential to be shown, in order that justice may prevail. For this purpose the

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mere entries of private persons, not sworn, if made in the due course of one's business, and as a record of one's acts, and by one having no motive for misrepresentation, are admissible. And although the rule has been thus far fenced round, with these supposed necessary safeguards, it is one exceedingly liable to relaxation, in any emergency, affording such a degree of stress, as at first induced its adoption.

But in the present case, it seems to us the doings of the notary were properly admissible according to the general principle deducible from all the decided cases upon this subject.

In *Pattershall* v. *Tusford*, 3 B. & A. 890 (23 Eng. C. L. Rep. 212,) TAUNTON, J., thus states the rule upon this subject. "A "minute in writing, made at the time when the fact it records took "place, by a person since deceased, in the ordinary course of his "business, corroborated by other circumstances which render it "probable that that fact occurred, is admissible in evidence."

This is the general doctrine of all the cases upon this subject. It is not essential that the entire record should be made at the very moment of the transaction, but it is sufficient if done within a few days, in the ordinary course of business. It is not expected in such cases, that positive proof will exist of the time of the entry being made. If it appear regular, and purports to contain a cotemporaneous record of the transaction, it will be entitled to the ordinary presumption in its favor.

The present case comes fully within these general rules. But in some cases this very evidence has been received to show the dishonor of a bill or note. In *Poole* v. *Dicas*, 1 B. N. Cas. 649, the entry of a notary's clerk in the notary's book, of *no effects*, was held sufficient evidence to prove the dishonor of the bill, with other circumstances. TINDALL, Ch. J. said, "We think it admissible "on the ground that it was an entry made at the time of the transaction, and made in the usual course and routine of business, by "a person who had no interest to misstate what had occurred."

In *Welsh* v. *Barrett*, 15 Mass. 380, the entries of a deceased messenger of a bank, where a note had been lodged for collection, was held evidence to prove demand and notice. This is certainly a stronger case than the present, and it has been very generally followed in this country. *Halliday* v. ———, 20 Johns. 168, was an action upon a promissory note and the protest and register of

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protests of a deceased notary, were held admissible evidence to prove demand and notice, such as was detailed.

The following cases confirm the same rule. *Nichols* v. *Webb*, 8 Wheaton 326. *Hart* v. *Wilson*, 2 Wend. 513. *Butler* v. *Wright*, 2 Wend. 369. *Nichols* v. *Goldsmith*, 7 Wend. 160. *Merrill* v. *Ithica and O. Railroad Co.*, 16 Wend. 587.

In Smith's Lead. Cas. 1 Vol. 224 Amer. note, it is said, citing from the New York cases, 2 Hill 537. 4 Hill 129, "It is now considered a settled rule, that entries and memoranda made in the due course of business, by notaries, clerks and other persons, may be received in evidence after the death of the person who made them."

We think the demand was all that could be required in the present case, under the circumstances, and incline to think this is a case where no formal demand was necessary. There was certainly no difficulty in the maker finding the note, as the residence of the holder was well known and the note was in fact at the very place where it would have been most likely to be looked for. And the maker having no domicil, or place of business at or near the place of payment, any demand would be vain and useless. And under such circumstances, ordinarily, no demand is required, but the excuse must be stated in such case, or the party may cause demand to be made at the most public banking house, as was done here.

The defendants' letters, too, afford the most satisfactory conformation of the regularity of the doings of the notary, and might, within the principle of the decided cases, be resorted to, if needful to make out a case, by themselves.

Judgment affirmed.

NOTE. Of a somewhat similar character to this kind of evidence, are declarations *in extremis*, the testimony of a deceased witness at a former trial, and memorandums made by the witness in order to enable him to retain an accurate knowl edge of a transaction, in regard to all which, very essential relaxations have from time to time taken place in order to conform to reason and good sense and the just moral weight of evidence. There can be no doubt, that in a moral point of view, and by that, we mean of course, its effect in convincing the understanding and the heart, the testimony in this case was far more satisfactory than that of any single witness upon the stand.

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RUTLAND COUNTY,

February Term, 1852.

[Continued from *ante*, page 289.]

Hall & Parker *v.* Caleb Hall.

Book Account. Plea in offset. Review.

In an action of book account, brought originally to the county court, where the defendant files a matter in offset, in assumpsit, or other contract, not on book, exceeding one hundred dollars, neither party is entitled to a review of the issue upon the plea in offset.

Book Account. Judgment to account was rendered in the county court, and an auditor was appointed, who reported a balance due from defendant to plaintiffs of $26.82, to balance book accounts between them.

Before judgment upon the report, defendant filed his plea in offset,—issue joined, on said plea, trial had, issue found for plaintiffs on said plea. Defendant moved for leave to enter a review on said plea in offset, which motion was overruled by the county court. Exceptions by defendant.

S. H. Hodges for defendant.

E. Edgerton for plaintiffs.

By the Court. The only question in the present case is, whether in an action of book account, brought originally to the county court, where the defendant files a matter in offset, in assumpsit, or other contract, not on book, exceeding one hundred dollars, either party is entitled to a review of the issue upon the plea in offset.

The Comp. Stat. 221, § 17, provides, "In all civil causes, tried "before the county court, either party may review." This has always been held to be the cause and not some separate issue, some adjunct, or incident, of the cause. That is the ground upon

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which the review is denied in a declaration for betterments. *Gage* v. *Ladd*, 6 Vt. 174.

Upon this ground, we think no review can be allowed on the ground of a plea in offset merely, except when the statute provides for it, i. e. where the cause is appealed from a justice, which is not this cause.

It is not necessary to consider, whether the judgment to account is reviewable or not. If it is, that will afford an additional reason why it should not also be reviewable upon the plea in offset, as the right is only given to the party to review the cause, and the plea in offset clearly is not the cause.

But it has certainly been generally considered, that an action upon book is not reviewable at all, as the judgment to account is merely interlocutory, and not perfected, until the report of the auditor is accepted and judgment rendered upon it. And it was never supposed that the case was reviewable after that. Possibly if the verdict is for the defendant, there might be an equity in allowing a review, but history affords no record of any such verdict ever having been given in an action of book account in modern days.

And if we regard the action as being one of those peculiar proceedings like the process against trustees, or some others, where no review is given, then we do not think the legislature having given the right to plead in offset, will also give a right to review the trial upon such plea. We could not do this without extending the statute, allowing reviews, in one case to another similar case, clearly not comprehended within the fair import of its terms.

Judgment affirmed.

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WILLIAM LINCOLN, ADMINISTRATOR, *v.* THE RUTLAND AND BURLINGTON RAILROAD CO. AND THE HEIRS OF WILLIAM LINCOLN.

[IN CHANCERY.]

Interpleader. Demurrer.

There should, to justify a bill of interpleader, be either some specific chattel, or some definite sum of money, to which different parties in the same right, or in priority of estate, make claim, and the person bringing the bill, should be a mere stake holder, having no interest in the matter; so that when the court decree an interpleader, the plaintiff can step out of the case altogether.

And where an administrator, who was also an heir to the estate, brought a bill in chancery, setting forth, among other things, that the commissioners allowed a claim against the estate, in favor of the Rutland and Burlington Railroad Company, for $1,000, being for ten shares of corporation stock, and that orator at the time did not deem it his duty to appeal, and the time of appeal expired, and since that, said Railroad Company have commenced a suit upon the administrator's bond, to recover this allowance, and that the heirs insisted the $1,000 should be distributed, and that the allowance was made by fraud, and that legal proceedings would be obtained for that purpose, &c. And that plaintiff is ready to pay it to whomsoever is entitled. And praying that the parties may interplead and orator may be allowed to deposit the $1,000 in court, to be disposed of as the judgment of the court may direct. And also praying for an injunction. Upon general demurrer, it was held, that the facts alledged will not entitle the plaintiff to relief, nor will the facts lay the ground of an independent jurisdiction in equity, for a bill of interpleader.

APPEAL from the court of chancery. The orator alledges in his bill, that the orator's father deceased in 1846, and orator became administrator, and on the 5th day of Ootober, 1846, gave bonds in the sum of $20,000 for faithful administration, with sureties.

Commissioners appointed, and they, on the 26th day of June, 1847, made report, and among other claims one of $1,000 in favor of defendants, being for ten shares of said corporation stock. And at the time orator did not deem it to be his duty to appeal, and the time of appeal expired, and since that the defendants have commenced a suit upon the bond, to recover this allowance. And said action is entered in the county court by defendants.

Bill also sets forth, the number of heirs and the representatives of such as have deceased. The heirs insisted the $1,000 should

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be distributed, and that the allowance was made by fraud, and that legal proceedings would be obtained for that purpose. And that they did, on the 8th of January, 1848, petition to be allowed an appeal from the allowance,— on the ground of fraud, accident, or mistake, and that is still pending, that the heirs still persist in their claim and the defendants in theirs, and that orator is ready to pay it to whomsoever is entitled.

Prays the parties may interplead, and the orator may be allowed to deposit it in court to be disposed of as the judgment of the court may direct. Praying, also, an injunction.

The defendants filed a general demurrer to the bill.

The chancellor sustained the demurrer, and decreed that the bill be dismissed, from which decree orator appealed.

E. Edgerton for complainant.

Foot & Hodges for defendants.

By the Court. The only question made in this case, is, whether the facts alledged in the bill will entitle the plaintiff to relief. It seems to be no proper case for a bill of interpleader, or in the nature of a bill of interpleader.

There should, to justify such a bill, be either some specific chattels, or some definite sum of money, to which different parties in the same right, or in priority of estate, make claim, and the person bringing the bill should be a mere stake holder, having no interest in the matter, so that when the court decree an interpleader, the plaintiff can step out of the case altogether. But that is not the case here. No specific sum of money, or chattels, are claimed by different parties. And the plaintiff is a necessary party to the litigation, having the same interest with any of the others, on the part of the estate.

In bills of interpleader, it is requisite, too, that the party should otherwise be in danger of paying the money, or the value of the chattel, more than once; in other words, that there should be no such privity between the plaintiff and either of the other parties, as to make a judgment conclude the right of such party. For if so, an interpleader is unnecessary. But in the present case, the plaintiff so represents the estate, in a legal point of view, that the

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judgment in favor of the Railroad Company, and the decree of the probate court, requiring payment of that among the other debts, will conclude all the heirs. There is no more necessity of an interpleader in this case, than in every case when a suit is brought against an administrator, or executor, or guardian, or any other trustee, which affects the ultimate interest of *cestui que trust.*

And in the present case, if the matter were still pending before the commissioners, no man would ever think of a bill of interpleader being necessary. All would say, at once, let the heirs appeal, as they have a right to do, if dissatisfied with the decision of the commissioners. And the fact that they did not appeal, can make no difference in principle, certainly it will not lay the ground of an independent jurisdiction in equity for a bill of interpleader. If the party were still entitled to an appeal, upon the ground that he had failed to take it, by fraud, accident, or mistake, he might safely calculate he would obtain it upon his petition, then pending. And if not entitled to it upon that ground, he had lost it through his own voluntary fault, *et lex suppeditet vigilantibus, non dormientibus.*

The real object of this bill, then, must have been to get rid of the effect of the allowance before the commissioners. But the bill contains no facts or allegations, which, in any view of the case, will justify the interference of the court of chancery with that allowance. So that, it cannot be maintained upon that ground merely. And it would scarcely be contended that a bill in equity is allowable, for the mere purpose of obtaining delay of the suit, upon the administrator's bond.

Decree affirmed with costs.

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HENRY SIMONDS *v.* STRONG, CHAMBERLAIN & CO.

Copartners,— their liability.

A partner, who was known to be a member of the firm, upon retiring from the firm, must publish notice of such retirement, in some newspaper where advertisements are inserted, and published in the place where the business is done, in order to shield himself from liability for the future debts of the firm, to those, even, with whom they had had no previous dealings.

And as to those with whom the firm have had dealings, actual notice is requisite. *Prentiss* v. *Sinclair*, 5 Vt. 149.

ASSUMPSIT on a promissory note for $467, dated at Rutland, on the 15th day of April, A. D. 1850, and made payable in three months from date at the bank of Rutland, and subscribed with the partnership name of Strong, Chamberlain & Co.

Upon the trial of this case, the defendants proved that they had entered into a partnership for the purpose of performing work on the Rutland and Burlington Railroad, some time in 1847; that James Worrall, who had been actively engaged in the business of said company at Ludlow, in the county of Windsor, on the 3d day of August, 1848, executed and delivered a release to the other members of said company, of the following tenor:—

"Know all men by these presents, that I, James Worrall, of "Ludlow, one of the partners of the firm of Strong, Chamberlain "& Co., in consideration of one dollar, received to my full satis- "faction of Timothy F. Strong, John Bradley, Selah Chamberlain, "Joseph Chamberlain, Stephen C. Walker, and George W. Strong, "hereby release, relinquish, and quit-claim unto Timothy F. Strong, "John Bradley, Selah Chamberlain, Joseph Chamberlain, Stephen "C. Walker, and George W. Strong, all my right and interest as "one of the partners in the firm of Strong, Chamberlain & Co., "in all the contracts and claim of said company for work on the "Rutland and Burlington Railroad, as well for the work done, as "for the work to be done, by said company."

It appeared, that immediately after the execution and delivery of this release by said Worrall, that he ceased to manage the business of said company, and left the State. It also appeared, that the said writ was served only on the said George W. Strong, Tim-

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othy F. Strong, and John Bradley, and that the other defendants had no notice of the pendency of the said suit.

It did not appear that the plaintiff had ever had any previous dealings with the defendants, except those counted upon in this action. It was admitted that defendants were partners from some time in 1847, down to the time said Worrall executed his release, on the 3d of August, 1848, under the name and firm of Strong, Chamberlain & Co., and no question was made on the trial as to the liability of all the defendants upon the note, except what arose from the execution of said release by Worrall and his leaving the business, as before stated. The business was continued under the same partnership name. There was no evidence tending to show that defendants, or either of them, had given any notice by publication or otherwise, that Worrall had parted with his interest in the firm, or that the partnership had been dissolved; and it was treated by the defendants as a conceded point that the plaintiff ought to recover the amount due upon the note, provided Worrall continued to be liable as a partner after the 3d of August, 1848.

The county court rendered judgment for the plaintiff to recover the amount of said note against all the defendants. Exceptions by defendants.

E. L. Ormsby for defendants.

Foot & Hodges for plaintiff.

By the Court. It seems to be perfectly well settled, both in England and this country, that a retiring partner, who was known to be a member of the firm, must publish notice of such retirement, in some newspaper where advertisements are inserted, and published in the place where the business is done, in order to shield himself from liability for the future debts of the firm, to those even with whom they had had no previous dealings. *Godfrey* v. *Turnbull*, 1 Esp. 371. *Weighton* v. *Puller*, 1 Stark. 375. 2 Chitty 121. *Leason* v. *Holt*, 1 Stark. 186. *Lansing* v. *Ten Eyck*, 2 Johns. 300. *Graves* v. *Merry*, 6 Cowen 701. *Bristol* v. *Sprague*, 8 Wend. 423.

And as to those with whom the firm have had dealings, actual notice is requisite. *Prentiss* v. *Sinclair*, 5 Vt. 149.

Judgment affirmed.

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MATTERS OF PRACTICE.

CHITTENDEN COUNTY,

December Term, 1852.

John Howard and others *v.* Colchester, Georgia, and Milton.

Practice.

Upon a petition for a road, the first committee appointed made examination and were nearly ready to report, when one of the number died. It thus became necessary to have some one appointed in his place, and a new examination. Under these circumstances, *it was held*, that this increased expense was necessarily incurred, in executing the commission, and must be regarded as taxable costs in the suit, as much as any other portion of the expense.

This was a petition for a road. The first committee appointed, made examination and were nearly ready to report, when one of the number died. It thus became necessary to have some one appointed in his place, and a new examination, and the costs were thereby increased very considerably. It was objected, that this increased expense should not be taxed against the towns, where the road was laid.

By the Court. This increased expense was necessarily incurred, in executing the commission. It must be borne by some one. It could not be expected it should fall upon the petitioners, or commissioners, as it accrued without their fault. It is, therefore, costs in the suit, in the ordinary sense, and we see no reason

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why it should not be regarded as taxable costs, as much as any other portion of the expense. It was surely such when it was incurred, and its character could scarcely be changed by such a providential event. The case of *Willard* v. *Harbeck*, 3 Denio 260, seems altogether in point. That was a case, where one of the referees was sick, and the party prevailing was allowed to tax costs for coming prepared for trial, before the referees, when the hearing was adjourned, by reason of the sickness of the referee.

WIRES & PECK *v.* JOHN M. FARR.

Practice.

Upon the question, how far it was competent for this court, in a case standing upon pleadings and demurrers, to revise any decision of the county court, except upon the very point upon which the case was made to turn in that court, *it was held*, that if the judgment is found erroneous, and reversed, it then is the settled practice of this court to look into all the issues standing upon the record, and render such a judgment, as the county court should have rendered.

IN the argument of this case, a question was made, how far it was competent for this court, in a case standing upon pleadings and demurrers, to revise any decision of the county court, except the very point upon which the case was made to turn in that court.

BY THE COURT. If the judgment below is affirmed, it will become unnecessary to look into any other question determined there, except the very one upon which the case was ended. But if that judgment is found erroneous, and is reversed, it then is the settled practice of this court to look into all the issues standing upon the record, and render such a judgment, as the county court should have rendered. The party against whom the case is determined below, excepts to the judgment, and not to the successive steps by which the court came to that result. So, too, the other party might have had many of the preliminary questions decided against him, but he is not at liberty to take exceptions to these

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preliminary questions, inasmuch as the ultimate judgment on the record is in his favor. A contrary course would sound not unlike an exception to the reasons for the judgment, when the judgment itself was in one's favor. No rule of practice, in this court, is better, or has been longer regarded as settled. Numerous reported cases might be cited, where the principle has been more or less distinctly recognized. *Porter* v. *Smith*, 20 Vt. 344.

JUDAH T. AINSWORTH *v.* JOSEPH E. PRENTISS AND OTHERS.

Practice.

Upon the question, how far it was necessary, in this court, for either party to state objections to testimony, in the course of the reading, *it was held*, to be the practice of this court to hear all the testimony read, in hearing appeals from chancery, which was read in the court of chancery, and then to hear the parties on all questions arising on the merits, and on all formal exceptions properly taken in the court of chancery, and which appear on the papers.

In the course of reading the papers, in this case, a question was stated to the court, how far it was necessary, in this court, for either party to state objections to testimony, in the course of the reading.

BY THE COURT. It is sufficient, where exceptions to testimony are minuted by the master, at the time of taking, according to the rules in the court of chancery, to entitle the party to insist upon the same at the final hearing, without any formal renewal of the exception, unless something transpires, at the hearing in the court of chancery, which is to be regarded as a waiver of such exception, either express or implied. It is the practice of this court to hear all the testimony read, in hearing appeals from chancery, which was read in the court of chancery, and then to hear the parties on all questions arising on the merits, and on all formal exceptions properly taken in the court of chancery, and which appear on the papers.

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JAMES I. CUTLER *v.* THE ESTATE OF H. THOMAS.

Practice.

The party who merely refers to cases, in his opening argument, without reading, is understood to acquiesce in such authorities not being read; and unless they are read by the opposite side, he is not strictly entitled to take them up again.

In the argument of this case, the counsel, in the closing argument, offered to read authorities, which had been referred to, but not read, in the opening argument.

BY THE COURT. It is not considered regular to read authorities in the closing argument, unless it be to explain those read upon the opposite side. The party who merely refers to cases in his opening argument, without reading, is understood to acquiesce in such authorities not being read; and unless they are read by the opposite side, he is not strictly entitled to take them up again. A contrary practice must tend to give the excepting party an unequal advantage in the argument, or lead to a double reply.

ARTEMAS ALLEN *v.* LUCRETIA RICE.

Practice.

This court is but a court for the correction of errors in probate cases, the same as in all other cases, and could not, with any propriety, exercise a discretion in regard to allowing costs, upon trials had in the county court.

And to bring any such questions before the supreme court, the matter must be decided by the county court, and their decision, and the grounds upon which it is made, stated upon the record, with the objections of the party; and if any question of law is thus raised, it may probably be revised by the supreme court.

In this case the verdict in the county court was for plaintiff, and the defendant claimed review, which was allowed and exceptions by the plaintiff, and now the parties wished to have judgment entered up, upon the verdict, which the court allowed, and ordered

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the amount certified to the probate court. A question was made in regard to allowing costs.

By the Court. In regard to costs, in appeals from commissioners, and the probate court, it is discretionary, by statute, with the court. But that is to be understood, as the court where the case is tried. This court has now no appellate jurisdiction in probate matters. The county court now has that jurisdiction in all cases, and has long had it, on appeals, from commissioners. This court is but a court for the correction of errors, in probate cases, the same as in all other cases, and could not, with any convenience, or propriety, exercise a discretion in regard to allowing costs upon trials had in the county court.

If it is desired to bring any such questions before this court, the proper course is to have the matter decided by the county court, and their decision, and the grounds upon which it is made, stated upon the record, with the objections of the party. If any question of law is thus raised, it may probably be revised here.

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Susan Manchester v. Marcena Manchester.

Practice.

In the case of a petition for divorce, the testimony of neither party is admissible on the main issue.

Nor is the wife a competent witness, under the act of 1852, for or against her husband, in any civil suit or proceeding.

By the Court, Redfield, Ch. J. This is a petition for divorce. On the part of the libellant, her deposition is offered as evidence on the main issue, and we are informed that of the libellee has been taken, and is ready to be offered. This testimony is relied upon, as having been made admissible by the statute of this State, passed at the last session.

The words of the statute are, "No person shall be disqualified as a witness in any civil suit or proceeding at law, or in equity, by reason of his interest in the event of the same, as a party or otherwise."

This provision is broad enough no doubt, to include a proceeding of this character, "any civil suit or proceeding, in law or equity," is as broad, as could well be imagined. And if the statute provided, in terms, that all parties should be witnesses, no doubt both parties to this proceeding would be thereby rendered competent. But the statute is not so broad as that. It only provides that no one shall be disqualified, as a witness, by reason of interest or being a party. Those disqualifications are removed, but no others, by this act.

It is now urged, that the husband and wife are incompetent to testify for, or against each other, upon the ground of the intimate and confidential relation subsisting between them, and the ill consequences likely to follow such a rule of admission. For if they can testify for each other, they must, on cross examination, be allowed to answer questions, tending to elicit testimony against each other, and the converse of the rule will follow, that they may testify against each other, and this must very essentially tend to destroy that confidence and harmony between them, which is so essential to the quiet and happy subsistence of the relation. This is substantially the reason of the exclusion urged. And it must

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be allowed that such a rule, with more or less of qualification, has been upheld and practiced upon, both at common law and in the American States. And the exclusion has been extended even to testimony offered by one party, after the divorce of the other, but to that extent, the rule is questioned.

We think there is no class of cases to which this rule of policy applies with more force, than to these proceedings for divorces. It seems to us, too, that it must be regarded as questionable whether it will be held allowable under this statute, for the husband or his antagonist to call their own and each other's wives. Such a result is certainly very much to be deprecated, and we think is neither expressly or impliedly justified by the act.

We think, therefore, that this testimony, and that of the husband is inadmissible, in this case. We make no account of a counter decision made upon this point at Rutland, without a moment's consideration.

The case of *Barbat* v. *Allan*, 10 Eng. Law and Equity Rep. 596, shows that the court of Exchequer have made a similar decision in regard to their statute, which is not unlike our own, and upon grounds which favor the construction we have adopted.

ADMINISTRATORS OF GARDNER G. SMITH, AND OTHERS v. THE ADMINISTRATORS OF JONA. WAINWRIGHT.

Practice.

Where there was an appeal, under the statute of 1852, from a decree of the chancellor dissolving an injunction, and the plaintiffs objected, that the notice, being merely from the counsel, and not from any order of the court, was insufficient; it was held, that the notice was sufficient.

The act of 1852 provides, that the appeal "shall be heard, on the application of "either party, at the next session of said court sitting in any county in the State, "either in regular or circuit session." *Held*,—this, in terms, contemplates the next session after the appeal, if there is time to give notice in season for the hearing at that term, and if not, at the next session, at which such notice can be given.

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And when a case is brought into such term, it properly belongs to the docket of that county, and must be disposed of, the same as the other business of the term, at the regular term, if the time is sufficient, and if not, at the circuit session for that circuit.

The same case is reported in this volume, page 97, and on page 98 read.

B. H. Smalley, A. O. Aldis, and *J. & J. G. Smith* for orators.

Barber & Bushnell and *A. Peck* for defendants.

By the Court, Redfield, C. J. This is an appeal from the court of chancery in the county of Franklin, from an order dissolving an injunction temporarily restraining the defendants from collecting certain notes, to the amount of $10,000, and more. The principal case was before this court, on appeal, on the last circuit, and decided at our circuit session, in Chittenden county, in June last. The general object of the bill is to obtain a set-off against the notes enjoined, of damages claimed for the breach of a bond, under penalty of $10,000, for the exclusive trade and good will of a certain district of country.

We decided a large portion of the case, and indeed the whole case, as it then stood, against the orators, but ordered the case retained in the court of chancery, to await the determination of a suit, at law, upon the bond, to enable that court, in the event of the plaintiffs' recovering in the suit, at law, and a refusal of the party defendants to pay the amount of the verdict, or to apply it upon these notes, to grant such relief as should be equitable upon a supplemental bill.

The great and leading point to be established, as the basis of all proceedings in the court of chancery, is a recovery in the suit at law. We do not learn that any proceedings have been taken in that case. But one term has intervened, and perhaps it could not have been brought to an issue, so early as this. The chancellor having dissolved the injunction upon the defendants' notes, an appeal was taken to this court, under the statute of last session, which appeal the defendants bring into this term, for trial.

1. The plaintiffs object, that the notice, being merely from the counsel, and not from any order of the court, is insufficient. But

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we think it was sufficient. It is much like a motion for an injunction, or to dissolve one before the court of chancery, and there, a notice from the party, or counsel, is always sufficient.

2. We are urged to continue the hearing of this appeal, into some other county, on the ground that the principal counsel are, at this time, engaged in attendance upon another court.

We should always be exceedingly rejoiced to accommodate, in regard to all such matters. But the statute gives a very extraordinary power to the parties, to appeal from the decision of a chancellor into this court, "upon the granting, dissolving, or refusing "to dissolve, any temporary injunction." And this appeal, for the time, as it seems to us, suspends all proceedings in the court of chancery, upon the case. It seemed necessary, therefore, to provide for a speedy determination of the appeal. To this end it is provided, that the appeal "shall be heard, on the application of "either party, at the next session of said court, sitting in any county "in the State, either in regular or circuit session."

We think this, in terms, contemplates the next session after the appeal, if there is time to give notice, in season for the hearing, at that term, and if not, at the next session, at which such notice can be given. It would be very inconvenient to the court, and the parties, to have these appeals traveling over the State, with this court. And as the words of the statute naturally lead to no such result, we are not inclined to adopt it, upon argument and construction.

We took the same view of this subject, in a case, at Middlebury, a few days since. We then held, that if neither party moved in the case, after the appeal was taken, it would regularly go into the supreme court, in the county where the suit was pending. If either party wished to expedite the hearing, they must bring it into the "next term of this court, sitting in any county in the State," in the words of the statute.

And when brought into such term, it was a case properly belonging to the docket of that county, and must be then disposed of, the same as the other business of the term, at the regular term, if the time was sufficient, and if not, at the circuit session, for that circuit. We have seen no cause, either in the argument of the plaintiffs, furnished us in writing, or from further examination of the statute, to change this determination. The case, then, being

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properly here, must be disposed of at this term, or go into the circuit session, or be continued to the next regular term; having adopted a general rule not to allow cases to go into the circuit session, for trial, unless for want of time to hear them at the regular term, if this motion for delay were to prevail, it should regularly go to the next stated term. But it seems to us that the reasons are altogether inadequate to justify any delay. The subject is not one of much complexity, and by means of the published opinion of this court upon the case, the necessity of continuing an indefinite injunction upon these notes to so large an amount, could be very readily appreciated, by counsel not previously instructed in the case. And we think the party might have been prepared to hear the appeal, at this time, by that extraordinary diligence which, from the nature of the case, it seems to us, it was his duty to use. We have, therefore, felt it our duty to determine the appeal, upon such knowledge as we can get of the case, which we think sufficient to justify us in saying, that the only modification of the order of the chancellor, which we deem it needful to make, is, that the defendants shall file in the court of chancery, in Franklin county, for the benefit of the orators, a bond, with sureties to the satisfaction of the clerk of that county, in the sum of $12,000, conditioned to pay any sum which shall be decreed the orators in this case.

The mandate of this court, is: That the decree of the chancellor, from which this appeal is taken, be so far modified, as to require the defendants to file with the clerk of the court of chancery, in the county of Franklin, a bond, with sureties to the satisfaction of said clerk, in the penal sum of 12,000, conditioned to pay to the orators any sum which shall be decreed them in this case, before such dissolution of the injunction shall become operative, and in other respects that said decree be affirmed. The costs of this appeal to be taxed, by the chancellor, in the principal case, as he deems equitable, and the case is remanded to the court of chancery, from which it came, to be there proceeded with.

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WINDSOR COUNTY,

March Term, 1853.

Oramel Hutchinson *v.* Horace Onion.

Practice.

A motion to recommit the report of an auditor, will not be entertained by the supreme court, when the case stands upon exceptions.

This was an action of book account, which came into this court upon exceptions to the judgment of the county court for the defendant. In this court, the plaintiff moved to have the case recommitted to the auditor for further hearing and additional report, founded upon the alledged new discovery of evidence of a material and decisive character.

By the Court. We have not, for many years, entertained motions to recommit the report of auditors, in this court, when the cases stand upon exceptions. The exceptions are regarded as only bringing up the questions of law decided in the court below. If any cause for a new trial has transpired since the trial, the benefit of which the party desires, it should be brought up on petition.

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ORANGE COUNTY,

March Term, 1853.

Daniel Tarbel, Jr. *v.* The White River Bank, and others.

Practice.

The rule of trial, on an appeal from the decree of the chancellor, dissolving an injunction, is the same as in other appeals, and the parties must be confined to the evidence used before the chancellor.

The party making the motion, is to go forward in the argument.

This was an appeal from the decree of the chancellor, dissolving an injunction. The parties had filed additional testimony, by way of affidavits, in this court. A question was made whether it could be read.

By the Court. The rule of trial on this class of appeals, from chancery, must be the same as it is in other appeals. The parties must be confined to the evidence used before the chancellor. All that was read before the chancellor will be read here, and all exceptions to the competency of the evidence, which was taken and noted in due time, will be heard, if desired, in the final argument in this court.

A question being made, as to which party went forward in the argument, the court said it was the party *moving* in the court of chancery; upon the question of dissolving an injunction, it is the party making the motion.

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WASHINGTON COUNTY,

APRIL TERM, 1853.

NEWELL KINSMAN *v.* GEORGE W. PAIGE.

Practice.

A case, brought into the supreme court, standing upon issues of law, on demurrer, and the judgment of the county court being reversed, and repleader awarded, should be retained, until by the new pleadings, some issue of fact is joined, whereby it becomes important to remand the case to the county court.

The reversal of a judgment of the county court, only opens such issues as were affected by the errors, for which the judgment is reversed.

A question was made whether this case was properly in this court, it having been brought into this court, standing upon issues of law, on demurrer, and the judgment of the county court being reversed, and a repleader awarded on terms, which had never resulted in any issue of fact. But, nevertheless, it had been carried down to the county court, and all the issues disposed of, unless the reversal of the judgment opened the trial of the issues of fact, upon which there were no exceptions.

BY THE COURT. Strictly speaking, in a case like the present, the case should be retained here until, by the new pleadings, some issue of fact is joined, whereby it becomes important to remand the case to the county court. But if before any such issue of fact is joined, the case should, by mistake, be ordered to the county court, and there proceeded with, but before all the issues of law were decided, it should by that court be sent here again, we should probably retain it, inasmuch as strictly it should never have been taken out of this court. We should be unwilling to embarrass the ulti-

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mate disposition of a case, by any irregularity of this kind. But in the present case, the only irregularity complained of, in the county court, seems to be, that they did not try again the issue of fact closed upon the record, before the case went first into this court, and which was then tried and disposed of, in a manner not objected to at the time, and which, it is claimed, is now open to be tried again, by the reversal of the judgment of the county court. We think the reversal of that judgment will have no such effect. The reversal of a judgment of the county court, only opens such issues as were affected by the errors, for which the judgment is reversed.

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ESSEX COUNTY,

MAY TERM, 1853.

ELAM WALTER *v.* HAYNES W. BELDING AND OTHERS.

Practice.

Where there were apparently two perfect records of the proceedings of a town meeting, it was held, that *parol* evidence must of necessity be resorted to, to determine which is the legitimate record.

And where the books of record of the town, are wrongfully held by a person claiming to be the town clerk, the writ of *mandamus* is the proper remedy; and the same may with propriety be supplicated by the legal town clerk himself; but if done by the town agent, in behalf of the town, is no such fatal irregularity, as to defeat the proceedings.

THIS was a petition, in the name of the town agent of East Haven, alledging that the defendant and certain others, had usurped the town offices, and having made a partition of them among themselves, were then exercising them without law or right, praying for a writ of *quo warranto*, or *mandamus*, or other appropriate remedy.

The court, in vocation, granted a rule, to show cause, which being served upon the defendants reasonable time before the term, a hearing was had upon the evidence. The facts substantially were, that the annual town meeting was warned on the 8th of March, 1852, and after the town assembled, and chose moderator, the defendant Belding and his friends moved an adjournment, which was debated some time, and a good deal of controversy had upon the state of the vote, but it was finally declared, by the moderator, no vote, and this was known to all concerned. Some few withdrew, declaring that the meeting was adjourned; but most of the objectors remained in and about the meeting, and some took a part in it. Horace B. Root, the former clerk, was present, and after the meeting had elected a clerk for the ensuing year, (Horace L. Walter,) he gave up the books to him, and he made a record of the proceedings on the 8th of March.

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The officers were elected throughout, and the meeting adjourned.

When the day to which defendants claimed the meeting was adjourned, came, a meeting was held, at which defendant Belding was elected clerk, and others to fill the other offices. Belding sued out a writ of replevin, and obtained the possession of the town books, and other fixtures of the town clerk's office. The book, when produced in court, contained an entry, certified by the former clerk, of the adjournment, as claimed by Belding, and a record of the proceedings at the adjourned meeting, at which he was elected clerk, made by himself, as clerk. All this, including the certificate of the former clerk of the adjournment, seemed to have been made after Belding obtained the possession of the books.

By the Court, Redfield, J. We think the meeting was not properly adjourned on the 8th of March, consequently Horace L. Walter is the legal town clerk of East Haven, and it is proper the town books should be speedily restored to his custody, for the purpose of enabling him to make legal records affecting the title of lands, as well as for other purposes. The form of the proceeding is not probably such, as would commend itself altogether to an English Attorney General, as an information for a writ in the nature of a *quo warranto*. But as a mere rule to show cause why some appropriate remedy should not issue, is perhaps well enough. There being apparently two perfect records, *parol* evidence must of necessity be resorted to, to determine which is the legitimate record.

The writ of mandamus seems to us the proper remedy in the case. It might, with perfect propriety, have been supplicated by the town clerk, Walter, himself. But being done by the town agent, in behalf of the town, is no such fatal irregularity as to defeat the proceeding.

The hearing being had upon the rule to show cause, as is common, the writ of mandamus will issue in the peremptory form, in the first instance, and as this settles the rights of all concerned, the case is only retained to know whether it shall become needful to take any further steps to enforce the writ.

Peremptory writ of mandamus to issue.

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CIRCUIT COURT

OF THE

UNITED STATES,

FOR THE

DISTRICT OF VERMONT,

MAY TERM, 1853.

AZARIAH BOODY AND ANDREW B. STONE *v.* RUTLAND AND BURLINGTON RAILROAD CO.

Contract. Performance. Payment, &c.

Where the plaintiffs contracted with the defendants, in writing, to build certain bridges on defendants' road, at a certain sum per foot, to be paid one-fourth in cash, and three-fourths in stock of the road at par value, and the contract was entirely silent as to the time or place of payment, *it was held*, that looking to that alone, the plaintiffs could not call for payment, either of the cash or stock, until a complete performance of the contract on their part, or at any rate before or any oftener than a bridge was fully complete; nor could they then sue and recover for the stock without proof of a special request and a refusal to deliver it. For if no time be fixed in the contract, or by other agreement of the parties, either express or implied, for the doing of the thing, a request is essential to the cause of action.

The defendants after the commencement of the suit mortgaged their road to secure the payment of debts due from them to third persons; *it was held*, that the act of mortgaging the road would not work or amount to a disability to perform the contract, or make the defendants liable to pay money in lieu of stock.

Where it appeared, that the defendants were in the custom of making monthly payments to their contractors, for work done on their road, upon estimates made by the engineer at the end of each month, and that usage or custom having been adopted with the plaintiffs, *it was held*, that this must be considered the rule of payment under the contract, established by mutual consent, and binding upon the parties.

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Boody et al. *v.* Rut. and Burl. Railroad Co.

After the making of the original contract, the plaintiffs proposed to put in iron bearings instead of wood, for so much per foot of the bridges, varying like the prices in the original contract, according to the different spans of the bridges, "in addition," as they say, "to the former proposal," thus leaving the mode of payment unchanged, *held*, that it might well be inferred that the mode of paying for the iron bearings was to be the same as that provided for building the bridges.

THE nature and facts of this case, as well as the points presented and determined in it, will fully appear from the opinion delivered by the court.

J. D. Bradley and ——— for plaintiffs.

C. Linsley and *D. A. Smalley* for defendants.

PRENTISS, J. This is an action of account to recover the balance of book accounts between the parties; a form of action given by statute of this State for such purpose, and long in use here. After judgment to account was confessed by the defendants, and duly entered up, the action, by agreement of the parties and order of court founded thereon, was submitted to the determination of referees. The referees have made and returned into court, a report, awarding to the plaintiffs the sum of $13,699,19, as being due to them from the defendants, to balance the accounts between them, and stating specially the facts and grounds upon which the award was made. Both parties have filed exceptions to the report, objecting to certain allowances made by the referees, and insisting that the report should be modified and corrected in those particulars, and judgment be rendered upon it accordingly.

The dealings between the parties, forming the subject of the action, originated in the undertaking of the plaintiffs to build for the defendants, and in their actually building for them, all the Railroad bridges in the Rutland and Bellows Falls divisions of their road. The original contract, consisting simply of a written proposition, made by the plaintiffs in a letter, in August, 1847, and accepted by the defendants in the same month, is very short and somewhat meagre, embracing but few details or particulars. After stating the general plan or model of the bridges, it merely regulates the rate and mode of compensation, without specifying the time or place of payment; that is, it only gives the prices of constructing the bridges per foot, varying according to their different

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spans, to be paid one-fourth in cash, and three-fourths in stock of the road at par value.

For the unpaid balance due, and payable under the contract in cash, according to the stipulated prices, including the work conceded to be extra, which was of course payable in money, it is not denied by the defendants that the plaintiffs are entitled to recover. The only questions presented by their exceptions are,—have the plaintiffs a right, on the facts stated in the report, to recover the value of the stock agreed to be paid? and if so, should the rule of estimate be its value in February, 1850, as allowed by the referees, which was sixty per cent. of its par value, or its value at the time of commencing the action, which was only fifty per cent.?

The written contract, as we have already seen, is entirely silent as to the time or place of payment; and looking to that alone, the plaintiffs could not call for payment, either of the cash or stock, until a complete performance of the contract on their part, or at any rate before or any oftener than a bridge was fully completed, nor could they then sue and recover for the stock without proof of a special request and a refusal to deliver it. It is an undeniable rule of law, that where the promise is, to do a collateral thing on request, the request is parcel of the contract, and no right of action arises, until a request be made. So, if no time be fixed in the contract, or by other agreement of the parties, either express or implied, for the doing of the thing, a request is essential to the cause of action. Here, no direct, formal request having been made by the plaintiffs for the stock, the question is, whether on the facts found and stated by the referees, a time was fixed for the payment of the stock, so as to make a special demand or request unnecessary, or whether the facts otherwise supersede or dispense with the necessity of such demand or request.

If the fact of the defendants having, since the commencement of the suit, mortgaged their road to secure the payment of debts due from them to third persons, and thereby put it out of their power to give the plaintiffs stock unincumbered, could be considered as disabling the defendants to perform their contract, it would, no doubt, render a request of the stock unnecessary, and a recovery could be had for it here, since the law allows a recovery, in this form of action, for items of account accruing or becoming due after the commencement of the action, as well as for those which

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had accrued or become due before. But we think the act of mortgaging the road would not work or amount to a disability to perform the contract. The debts were really as much a charge upon the road, or incumbrance upon the stock, before, as after the mortgage. The mortgage, it is true, might have the effect to depreciate the stock in the market, and render it less valuable to the holder; but every purchaser of, or contractor for stock, knows that he must take and hold it subject to all charges incident to the completion and use of the road, and the accomplishment of other legitimate objects of the corporation. We cannot, therefore say, that by the act of mortgaging the road for the purpose mentioned, the duty of the defendants to pay stock, was converted into an obligation or liability to pay money in lieu of the stock. The right of the plaintiffs to recover for the stock, if any such right exists, must then rest upon the other facts reported in the case.

The time of payment, there being no stipulation in the written contract on the subject, may unquestionably be inferred from other evidence, such as the usage of the company in paying their contractors, the acts of the parties, or the course adopted and pursued by them under the contract. Such evidence does not contradict any of the terms of the contract, but is mere suppletory matter, showing the understanding and intention of the parties, or rather the practical construction put by them upon the contract. Now, it is expressly stated in the report, that it was the custom of the defendants to make monthly payments to their contractors for work done on their road, upon estimates made by the engineer, at the end of each month, and that this practice was adopted with the plaintiffs. It thus appearing to have been the usage of the company to pay monthly on the estimates, and that usage having been adopted in reference to the plaintiffs, the referees might well consider it as the rule of payment under the contract, established by mutual consent, and binding upon the parties.

The report says nothing as to the place of payment. If the place, as well as the time of payment, had been fixed, it would be sufficient for the defendants to show that they were ready at the time and place to make payment. But if no place was fixed, it would be the duty of the defendants, at or within the time, to tender or offer the stock to the plaintiffs. If the payments were not made monthly, in full, by reason of the estimates not being made

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in full, as appears to have been the case, the fault would seem to be on the part of the defendants, the estimates being made by an officer in their employment, and acting under their control. It was owing to the estimates not being made in full, as is stated to have often happened in practice, that there was so large an unpaid balance due the plaintiffs in cash and stock, on the completion of their contract, in December, 1849. After that, I suppose no estimates were necessary. The plaintiffs soon called for money on account of the contract, but the defendants declined paying any, until there had been an examination of the accounts. For the purpose of such examination, and with the view of making a final adjustment of the plaintiffs' claims, the parties met, in February following; but no settlement was effected, as they could not agree on the amount due, or on the mode of payment of some of the items in the account: the plaintiffs claiming that the extra work and iron bearings should be paid for wholly in cash, and the defendants claiming that all extra work connected with the bridges, and also the iron bearings, should be paid for in stock and cash, as under the contract, and refusing to settle upon any other terms. On these and the other facts stated, the defendants having made no tender or offer of stock; the referees found that the plaintiffs were entitled to recover the value of the stock; and having so found, we are not disposed, under the circumstances of the case, admitting the point not to be entirely free from doubt, to disturb the award on that account. It follows, of course, if the plaintiffs had a right of action at law, in February, 1850, to recover for the stock, it should be estimated, as it was, according to its value at that time.

The other question in the case, arises out of the exceptions filed by the plaintiffs, and relates to their claim for the iron bearings. The question is, whether this claim falls within the terms of the original contract, to be paid in the manner therein stipulated, one-fourth in cash and three-fourths in stock, or whether it should be treated as in the nature of a claim for extra work, to be paid, of course, wholly in cash. The referees considered it as subject, in that respect, to the terms of the original contract, and have allowed the claim, and stated the account, according to the mode of payment therein prescribed; and we think they were justified in so doing.

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Where the parties deviate from the original plan agreed upon, and the terms of the original contract do not appear to be applicable to the new work, it being beyond what was originally contemplated by the parties, it is undoubtedly to be regarded and treated as work wholly extra, out of the scope of the contract, and may be recovered for as such. But it is otherwise, if the original terms be not inapplicable, and there be evidence from which it may be inferred that it was the intention of the parties that the new work should be subject to those terms. Here, the original agreement contains particular stipulations as to the mode of payment for building the bridges, and the subsequent agreement, under which iron bearings were substituted for the wood bearings, contemplated in the original plan, is wholly silent as to the manner of paying the additional expense they would occasion. From that circumstance, taken in connection with the expressions employed in the latter agreement, it might well be inferred that the mode of paying for the iron bearings was to be the same as that provided for building the bridges. The plaintiffs propose to put in iron bearings instead of wood, for so much per foot of the bridges, varying, like the prices in the original contract, according to the different spans of the bridges, "in addition," as they say, "to the "former proposal," thus referring to the original contract. The intention and effect of the second agreement, would seem to be simply to vary the original plan so far as to substitute iron bearings for wood, and to make a corresponding alteration of the original stipulated prices, by adding thereto so much per foot as would cover the additional cost, leaving the mode of payment unchanged. It was not intended as a separate independent contract, but merely as supplemental or additional to the other; and no doubt, in pleading, a declaration stating the original contract, and the agreement altering its terms in the particulars mentioned, would be good in law.

Such being the views we take of the points raised in the case, the consequence is, that the exceptions of both parties must be overruled, and judgment be rendered on the report for the sum awarded to the plaintiffs, with interest thereon from the time of filing the report.

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Ezekiel Byam and others v. Ezra B. Eddy.

[At Chambers, January 15th, 1853.]

Infringement of Patent. Motion for attachment for contempt, in violating an injunction.

Where a person held a patent for an improvement in making friction matches, the invention being only a new combination of old materials before in use, consisting in a composition formed of phosphorus, with the earthy material and the glutinous substance only, without the presence of chlorate of potash, or of any other like objectionable ingredient; it was held, that any person may use any one or all the materials forming the composition, in making matches, provided he does not use them in the combination patented, or that any one may lawfully use them for such purpose, in combination with chlorate of potash, as they were formerly used.

But a mere colorable difference or slight variation of the combination, would not exempt a person from the charge of infringement.

The defendant, upon the service of an injunction, having executed a bond to the plaintiffs, acknowledging the validity of the patent, and the plaintiffs' right to all that is granted by it. *Held*, that it is no evidence of a breach of the injunction, further than the recital in it, that the defendant had infringed the patent, may have a tendency to establish such breach; and that the inference or presumption arising from it may be overcome by credible and positive testimony.

An injunction having been granted pursuant to the bill filed against the defendant, the plaintiffs afterwards appeared in court, and moved for an attachment against him for a breach of the injunction. An order to show cause against the motion was thereupon issued and served upon the defendant; and his affidavit in answer thereto being filed, the matter came on to be heard upon affidavits and exhibits. The facts, with the questions presented, will appear from the opinion delivered by the court.

D. A. Smalley and *J. A. Prentiss* for plaintiffs.

L. Underwood and *B. Rixford* for defendant.

Prentiss, J. This is a motion for an attachment against the defendant, for contempt in violating the injunction granted against him, September 22d, and served upon him, September 23d. The

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injunction, which it is proper to observe was granted virtually without any hearing on the part of the defendant, though upon notice and appearance, refers to the bill, and by the terms of reference was intended to be co-extensive with the bill, and must be so understood. We must, therefore, look to the bill to see the extent of the injunction, what it forbids, and consequently what would be a disobedience of it.

The bill sets forth the patent to Phillips, with the specification, in full. The patent is stated to have been issued October 24th, 1836, for fourteen years; renewed and extended September 11th, 1850, for seven years from and after the expiration of the original term; and assigned to the plaintiffs, September 17th, 1850. The patent purports to be for "a new and useful improvement in "the manufacture of friction matches," and grants the exclusive right of making, using, and vending to be used, "the said im-"provement."

The specification, after stating the invention to be "a new and use-"ful improvement in the mode of manufacturing friction matches for "the instantaneous production of light, and to consist in a new compo-"sition of matter for producing ignition," proceeds to say: "The "composition used in preparing the matches usually called loco foco, "and which light by a slight friction, is a compound of phosphorus, "chlorate of potash, sulphuret of antimony, and gum-arabic, or "glue. That which I use, consists simply of phosphorus, chalk, "and glue." The specification, then, states the proportions of the ingredients, and the mode of preparing the composition; and after saying that the proportions may be varied, and that the ingredients may also be varied by substituting gum-arabic, or other gum, for glue, and Spanish white, or other absorbent earth or material for chalk, concludes in these words: "What I claim as my "invention, is the using of a paste or composition to ignite by "friction, consisting of phosphorus and earthy material and a glu-"tinous substance only, without chlorate of potash, or any highly "combustible material, such as sulphuret of antimony, in addition "to the phosphorus."

From the specification, it is obvious, that the right secured by the patent consists, as expressed in the granting part of the instrument, merely in an improvement in the then existing mode of making friction matches; not in a combination of new ingredients

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not before known and used for that purpose; nor in a combination of any new with old ingredients, unless the use of chalk, Spanish white, or other absorbent earths, may be considered new, which would be contrary to the fact, as appears from the testimony of William Weller, an old manufacturer of friction matches, in Fort Ann, New York. This witness, after stating that all the materials, except the absorbent earth, were contained in the old Lucifer matches, says that, that substance, as well as the other materials, was contained in the loco foco matches; and that in 1835, he made matches formed of glue, or gum-arabic, and chalk, or Spanish white, combined with phosphorus and chlorate of potash, and during the spring and summer of 1836, publicly made, used, and sold, matches composed of these materials, and has continued to use the same composition from that time to the present.

The invention claimed in the specification, then, is not a compound of new ingredients, before unused in making matches, but simply and only a new combination of old materials before in use for that purpose. It purports to consist in a composition producing ignition and combustion by friction, formed of phosphorus, with the earthy material and the glutinous substance only, without the presence of chlorate of potash, or of any other like objectionable ingredient, thus avoiding the danger supposed to exist in the combination of substances of such a nature with phosphorus. This, as I understand the specification, is the "new composition of "matter," or new combination of materials, for producing ignition, claimed and patented as an improvement; and it seems quite clear, that any person may use any one, or all the materials forming the composition, in making matches, provided he does not use them in the combination patented. Certainly, any one may lawfully use them for such purpose, in combination with chlorate of potash, as they were formally used; for that is a combination recognized as essentially different, as well as being known and in use anterior to the patent.

The question, therefore, is, whether the defendant, in manufacturing and dealing in friction matches since the service of the injunction, as it is admitted he has done, has used the plaintiffs' improvement or combination of materials, or, in other words, made matches substantially according to their patent. I say, *substantially* according to their patent; for a mere colorable difference,

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or slight variation, would not exempt the defendant from the charge of infringement. Such is the question in the case; for, the injunction, as we have seen, not extending beyond what appears from the bill to be the right of the plaintiffs, unless there has been a violation of the right held by them under the patent set up in the bill, there can have been no disobedience of the injunction.

The plaintiffs' composition for matches, as described in their patent, and charged to have been used by the defendant, is a compound, admitting of variation in the proportions of the ingredients, of one ounce of phosphorus, one ounce of glue, or gum-arabic, and four ounces of chalk, Spanish white, or other absorbent earth.

The composition asserted by the defendant to have been used by him, and which appears to have been publicly known and in use before the date of the plaintiffs' patent, is formed of four pounds of glue, two pounds of phosphorus, four pounds of whiting, and three-fourths of a pound of chlorate of potash; or, somewhat varying the ingredients and proportions, of four pounds of gum-arabic, two and one-half pounds of phosphorus, four pounds of whiting, and one-half of a pound of chlorate of potash.

The only difference, aside from the relative proportions of the ingredients, between the composition patented and that claimed to have been used by the defendant, consisting, as appears from the formula thus given of each, in one being made without, and the other with chlorate of potash, the question in the case is reduced to the simple inquiry, whether the matches manufactured by the defendant contained that substance as a principal ingredient or material part, in conformity with the prescribed form, or were made without the use of it, or with but so inconsiderable a portion of it as to be substantially according to the plaintiffs' patent.

The defendant, in his answer to the matters charged against him on this motion, after declaring that he has never violated or infringed the plaintiffs' patent, and that the bond executed by him to them, was given through misapprehension, on his part, of the extent of their patent and of his own rights, occasioned by misrepresentation, says, that he has never at any time since he commenced business, which was last spring, made a match without the use of chlorate of potash; nor out of any composition of which that substance was not a constituent part; nor otherwise than ac-

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cording to what he states to be the ingredients, and their proportions, in the composition used by him.

Now, is the statement thus made by the defendant in his answer, true or untrue? What is the proof relative to the main essential fact asserted in it? Is the fact proved or disproved? In deciding this, if the proofs applicable to it are in any degree conflicting, they must be weighed, and the fact determined according as the weight or preponderance of proof may appear to be.

It appears that specimens of both kinds of matches manufactured by the defendant, there being two kinds as inferable from the marks and labels, have been analyzed by Dr. Hayes, a professional chemist, and, for anything that is shown, a man of science and skill in his profession. In stating his analysis of one of the kinds of matches, Dr. Hayes says, that he found the composition to contain, with the other materials he specifies, a very small portion of chlorate of potash, or nitrate of potash. In stating another or second analysis of matches, marked as of the same kind, he mentions chlorate of potash as one of the materials of the composition, without saying anything as to its quantity or relative proportion. In giving his analysis of the other kind of matches, he names the substances into which the composition was resolved, without any mention of chlorate of potash as one of them. But in reference to both kinds of matches, he says, that phosphorus, gum or glue, and whiting or chalk, formed the essential parts of composition, and that the composition was essentially the same as that of the matches made under the Phillips' patent.

The results of these analysis, at least, as to one of the kinds of matches, do not appear to disagree with what the defendant declares to be the constituent parts or materials of the composition used by him, except as to the quantity or proportion of chlorate of potash contained in it. And as to the other kind, the disagreement is a matter of implication or inference, rather than of positive assertion or statement. Dr. Hayes says, to be sure, as to both, that the other ingredients, phosphorus, gum *or* glue, and whiting *or* chalk, formed the *essential* parts of the composition,—a somewhat indefinite expression, implying, at least, that they did not form the whole of the composition. He admits that chlorate of potash, to some extent, was found in one of the kinds of matches, and he does not say that none of it was found

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or contained in the other. What proportion this substance bore to the others, in the two analysis in which it is admitted to have been found, is not stated, and according to the opinion of one of the witnesses in the case, could not have been ascertained by chemical process. The point is a very material one, requiring some exactness of proof, at least, as much as the nature of the subject will admit of, whether the proportion of chlorate of potash in the composition used in making the defendant's matches, was really very small, so small as to be merely colorable, or to justify its being considered as used for the purpose of evasion, or whether the proportion was such as has always been used in that kind of composition, or as makes it a substantial part of the composition.

The bond executed by the defendant to the plaintiffs, is an acknowledgement of the validity of the patent, and of the plaintiffs' right to all that is granted by it. It is no evidence of a breach of the injunction, certainly, any further than the recital in it, that the defendant had infringed the patent, may have a tendency to establish such breach. But the recital, in terms, only proves an infringement prior to the execution of the bond. The bond was executed in May; the pending proceeding relates to acts which have occurred since the service of the injunction, and embraces nothing further back than the 23d of September. Still, the admission of a prior infringement, unless procured by fraud, or made through mistake, is entitled to its proper influence, with the other evidence in the case, in deciding upon the character of the acts directly in question. But no inference or presumption arising from it, can overcome the weight of credible, positive testimony, such testimony being uncontradicted by any proof of the same nature or of equal certainty. This is especially true in a case partaking of the nature of a criminal proceeding, involving not only the imprisonment of the party by way of punishment, but also the breaking up of his business.

Now, George E. Arnold says, that he has worked for the defendant in his shop, at Burlington, in the manufacture of friction matches, since the 15th of April last, and has made up the composition for most of the matches, and assisted in making all that has been made in the shop. He states the materials, with their proportions, used in the composition, which are the same specified in the formula we have already given. He says that all the

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matches have been made according to the specifications in the formula; that no matches have been made, to his knowledge, of other or different materials; and that if any had been otherwise made, he thinks he must have known it, as he has been constantly in the shop.

Such, then, is the substance of the proofs relative to the actual composition of the matches manufactured by the defendant,—a fact, upon which, as we have seen, the case wholly rests. On the one side, the results of chemical analysis, such as have been already stated; on the other, the positive testimony of a witness, standing unimpeached, having full means of information, and swearing from actual knowledge. On which side the weight of proof is, would seem not to admit of a doubt, especially when it is remembered that one of the witnesses, who professes to have acquired much knowledge and skill in such matters from long practice and experience, says, that he considers it impracticable to ascertain the proportions of the ingredients of a match by analysis. How this may be, I am unable to say; but such is the testimony. Upon the testimony I am to judge and determine; and my judgment is, what appears to be alone warranted by the proofs as they stand, that the attachment be refused, and the rule of course discharged.

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ADDITIONAL RULES

OF SUPREME COURT.

RUTLAND, FEBRUARY TERM, 1853.

No. 1. No case will be allowed to pass into the Circuit session of this Court, from any County for trial, unless for want of time to hear the same at the regular Term.

CHITTENDEN, JANUARY TERM, 1853.

No. 2. The several Clerks in the State shall be allowed twenty-five cents *each*, for filing of the assignment, schedule of property, and schedule of debts, and all other papers made necessary to be filed in his office, under the statute of this State, in regard to assignment for the benefit of creditors, to be paid by the party filing the same, and at the time of filing; and for other services under that law, the same as in Chancery.

CALEDONIA, MAY TERM, 1853.

No. 3. In the argument of cases in this Court, no more than two hours will be allowed to all the counsel upon either side, without the special leave of the Court, granted before the argument begins.

No. 4. Before the argument begins, the Clerk shall furnish a copy of the case, so far as to show the questions decided in the Court below, for each Judge present; and where it can be done without increasing the expense of copies, he shall procure them to be printed; and the same shall be allowed in taxing costs, as if made by the Clerk's own hand. And this Rule shall include an abstract of the charging and stating part, and the prayer of the Bill; and also of the answer, in cases of appeal from chancery; and a copy of the opinion of the Chancellor, if one be filed in the case.

ISAAC F. REDFIELD, *Chief Justice.*
PIERPOINT ISHAM, } *Assistant*
MILO L. BENNETT, } *Justices.*

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INDEX.

ABATEMENT.

1. Where the defects, sought to be taken advantage of, are in the form of the authority, or in the service of the writ, it should be by plea in abatement. *Bliss et al.* v. *Conn. & Pass. Rivers R. R. Co.*, 428.

2. But when the defect complained of, is a total want of an essential ingredient either in the writ, or service of the writ, and that apparent upon the record, it may be taken advantage of upon motion to dismiss. *Ib.*

3. A plea in abatement, where defendant pleads, "that the said writ abate, because "he says that said writ was served upon this defendant, more than sixty days "before the time therein appointed for trial, to wit: said writ was served July "5th, 1851, and the time set for trial therein, is September 4th, 1851, and has not "been served at any other time since said 5th day of July, and this the said de-"fendant is ready to verify, by the record. Wherefore, he prays, that the "same may be quashed," was held sufficient on special demurrer. *Gray* v. *Flowers*, 533.

4. And it was also held, that as this plea verifies the facts, by the record, it may be treated as a motion to dismiss, and as such is sufficient. *Ib.*

5. In a plea in abatement, praying that the writ may be quashed, is equivalent to a prayer of judgment of the writ, and one prayer of judgment, in one plea, is sufficient. *Ib.*

See PLEADING 1.

ACCOUNT.

1. Where A. consigned merchandise to B. to sell on commission, with instructions to "sell for cash, or not on credit," and B. sold and delivered the goods to a person who said he would pay for them in a few days, which promise he renewed from time to time, at intervals of two or three days, for two or three weeks, when he failed. In an action by A. against B. to recover the value of the goods,—held, that B. could not show in defense, a custom by which such sale was considered a cash sale. *Catlin* v. *Smith*, 85.

ACTION ON THE CASE.

1. It is the duty, by law, of the Vermont Central R. R. Co. to erect and maintain such fences and cattle guards, upon their road, as will prevent horses and other animals, from passing them,—as held in *Quimby* v. *Vt. Cen. R. R. Co.* 23 Vt. 393. *Trow* v. *Vt. Central R. R. Co.* 487.

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2. The degree of negligence, of which the corporation will be held guilty, in the omission to discharge this duty, will depend upon the locality of their road, and of the particular place, in respect to which the omission occurs. The omission to erect and maintain such fences and cattle guards for a considerable distance, at a place so public and common, as, that it may reasonably be expected that cattle and horses will stray upon the railroad track, is, in law, such a neglect of duty as will render the corporation liable for injuries arising solely from that cause. *Ib.*

3. But it is the duty of the owner of cattle and horses, knowing the exposed situation of the railroad track, to exercise as much care and prudence in keeping his property from exposure to injuries therefrom, as is required of the corporation in guarding against their commission; and if, in such case, he permits his cattle or horses, to run in the highway, knowing that there is no obstruction to their passing from thence upon the railroad track, he is guilty of the same degree of negligence as that with which the corporation are chargeable, in permitting their railroad to remain thus exposed. *Ib.*

4. When there has been mutual negligence on the part of the plaintiff and defendant, and the negligence of each was the proximate cause of the injury, no action can be sustained. *Ib.*

5. So, where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting in some other matter than what occurred at the time of the injury, no action can be sustained. *Ib.*

6. But where the negligence of the defendant is proximate, and that of the plaintiff remote, the action for the injury can well be sustained, though the plaintiff were not entirely without fault; so that, if there were negligence on the part of the plaintiff, yet if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury. *Ib.*

7. If the plaintiff were guilty of negligence, or even of positive wrong, in allowing his cattle, or horses, to run in the highway, from whence, through the want of a fence, which it was the duty of the railroad corporation to maintain, they strayed upon the railroad track, the corporation are yet bound to the exercise of reasonable care and diligence in the use of their road, and management of the engine and train, and if, for want of that care, the injury arose, they are liable. *Ib.*

8. Where it appeared that the defendants, a railroad corporation, were guilty of negligence in not erecting and maintaining suitable fences and cattle guards upon the line of their road, and that the plaintiff had permitted his horse to run in the highway, which passed near such railroad, having knowledge that there was no fence or cattle guards, which would prevent the horse from passing from the highway to and upon the railroad track, and the horse did stray upon the track, and was killed by a locomotive engine which was passing, and it appeared that the defendants were guilty of no negligence in the management of the train, or engine, when the injury arose,—it was *held*, that the plaintiff could not recover for such injury. *Ib.*

See PLEADING 7, 8. SCHOOL DISTRICT 3.

ADMINISTRATORS.

1. The entry in the county court of the name of the second administrator is a matter of course, it is a thing which the county court could not legally refuse; and

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it is not important, that he should be designated *de bonis non*. *Steen, Admr.* v. *Bennett et al.*, 303.

2. An administrator cannot charge in his account, for the payment of a claim dis allowed by the commissioners, after the right of appeal had lapsed, nor can he charge for the payment of a claim not presented to the commissioners, if the claimant had no farther right to petition the probate court to open the commission. *French et al.* v. *Winsor*, 402.

3. But if an administrator finds a claim not allowed by the commissioners, which was clearly due, and when no doubt could be entertained but that the probate court would extend the commission, to give an opportunity to present it, and where no question could be made as to its allowance; if under such circumstances. the administrator should pay the claim in good faith, and if under such circumstances, the claim cannot be allowed the administrator in his account, in the probate court, *quere*, whether a court of equity ought not to devise some remedy. *Ib.*

See PROBATE COURT 9, 11.

AGENT.

1. The general Agent or Treasurer of a corporation or joint stock company, have the right to negotiate notes and bills taken in his name of office, and where it appears that such companies intrust their treasurer or general agent to take notes, and he indorses them, his acts will bind the company. *Perkins et al.* v. *Bradley*, 66.

2. And this authority is to be implied from his being treasurer of the company, and intrusted with the notes of the company, and their being made payable to him. *Ib.*

3. And in declaring, it is sufficient to describe the history of the plaintiff's title to the note, without setting forth the authority of the treasurer. *Ib.*

4. And it would be sufficient description of the indorsement to say "and by them "indorsed to the plaintiff." So, also, it would be sufficient to say "that the "agent of said company indorsed said note to the plaintiff," without describing said agent, or his authority. *Ib.*

5. If A. purchases a quantity of goods and intrusts them to B. to sell, (as the property of A.,) but gives B. no authority to purchase in addition to those delivered, and B. assumes the authority to purchase goods in the name and on the credit of A., by so doing B. exceeds the powers of his agency, and A. is not liable to the vendor, for the goods thus purchased. *Soule* v. *Dougherty*, 92.

6. And where the agency has terminated, except for the purposes of rendering an account to the principal, and the agent, without any necessity to justify an extension of his powers by implication, and without the knowledge or consent of the principal, commences suits in the name of the principal, upon notes or demands taken by him in the principal's name, the agent exceeds his power, and the principal is not liable for the costs that accrue upon the said suits. *Ib.*

7. And where the debtors were committed to jail upon the suits thus commenced by the agent, and the principal discharged them from imprisonment, it was held,— even if the principal, by this act, had created a liability against himself, that book account was not the appropriate remedy to enforce the liability thus created. *Ib.*

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8. Where the plaintiff owned the business, and hired another to carry it on, and the defendant had business done, it is of no importance whether the defendant knew that the plaintiff owned the business, unless he has suffered loss by being misled in that particular. *Wait* v. *Johnson*, 112.

9. The Bank of Rutland applied to one Burdick to get out a quantity of stone conformable to a model which he had furnished, (for the purpose of repairing the vault of the said Bank,) and also to do the work. Burdick refused either to get the stone or do the work. They next inquired if he could not see to the getting out of the stone, and to the doing of the job. Burdick replied that he knew men whom he could employ to do the work, and that he would see to it as much as he could without neglecting his business on the Railroad. The Bank told him to go on, get out the stone, and do the job. Thereupon Burdick employed the plaintiff to do the work for the Bank; and upon these facts, it was *held*,—that Burdick was the agent of the Bank; that the account of plaintiff was properly charged to the Bank, and that they were liable to the plaintiff for the labor thus performed. *Alexander* v. *Rutland Bank*, 222.

10. Where a school district employed the plaintiff to superintend the repairs of a school house, they knowing his habits and ability in this respect, it was held, that the plaintiff was entitled to recover for the work, what it was worth to him to do it. *Felt* v. *School District*, 297.

11. The defendant consigned a quantity of cheese to the plaintiffs, as commission merchants, in Boston, Massachusetts, and they sold a portion of the same on the 12th of September, to Henry Dean & Co., and on the 20th day of said September, the plaintiffs rendered a full account of their dealings with the defendant, and struck a final balance of "net proceeds," deducting commissions, and all other charges, stating "Amount to your credit $801.66, which you can draw for at "sight," adding, "when you write us again, please say if you wish us *to remit* "*to you*, or you draw on us for the amount." After the receipt of this statement the defendant drew upon the plaintiffs, and they paid a large portion of this sum or balance. Dean & Co., before the plaintiffs had collected of them the amount due for the cheese sold to them, became insolvent and went into bankruptcy, but the plaintiffs did not inform the defendant of the fact of their indebtedness or bankruptcy, until nearly thirty days after their failure. *It was held*, upon these facts, that there was an actual, positive and unqualified assumption by the plaintiffs, of the sale to Henry Dean & Co., as cash in hand. *Jackson et al.* v. *Bissonette*, 611.

12. It was also *held*, that a payment made under such circumstances, the money is not to be recovered back, except upon the clearest case of fraud, on the part of the defendant, or mistake of facts, by plaintiffs; not the mistake of future contingencies, but present, and important facts, forming the basis upon which plaintiffs made the payment. *Ib.*

13. And it was also *held*, that an express promise of the defendant to refund the money thus paid by the plaintiffs, would be a mere *nudum pactum*. *Ib.*

See ACCOUNT 1.

AMENDMENT.

1. The plaintiff commenced his action on book account against several defendants, and the same was committed to an auditor, who made his report to the county court; before said report was accepted, the plaintiff moved the court for leave

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to strike out the name of Rufus Chase, one of the defendants, it appearing that said Chase was not in life when the services for which the plaintiff claims a recovery were contracted for and performed. The court granted the leave asked, and thereupon rendered judgment on the report for the plaintiff against the other defendants. It was held that the court, in allowing this amendment, did not exceed their power and duty. *Winn* v. *Averill et al.*, 283.

2. Amendments to the record can be made, as well on motion to dismiss, as on a plea. *Bliss et al.* v. *Conn. and Pass. Rivers R. R. Co.*, 428.

APPEAL.

1. An action upon a promissory note, originally above twenty dollars, and indorsed below that sum, but not below ten dollars, the *ad damnum* in plaintiff's writ being over twenty dollars, is appealable, and regard is to be had only to the note as originally given, and if the face of the note exceeds twenty dollars, the case is appealable. *Sumner* v. *Jones*, 317.

2. Where the friends and relatives of an alledged insane person, made application to the probate court to appoint a guardian over the alledged insane person, and the probate court upon hearing the application, made a decree refusing to appoint a guardian; and one, who petitioned the probate court with others, as friends and relatives of the alledged insane person, appealed from the said decree, it was held, on motion to dismiss the said appeal, that the friend or relative, in the case where no guardian is appointed, and the guardian, in the case where the decision is that the ward is no longer a proper subject of guardianship, are not, by the provisions of the statute, entitled to an appeal. *Nimblet* v. *Chaffee*, 628.

ARREST.

1. When a party privileged from arrest, is arrested, he may, within the discretion of the court where the suit is pending, either against the principal or the bail, plead his privilege, and enter an *exoneratur* on the bail bond, or discharge the bail on his own motion. *Washburn* v. *Phelps*, 506.

2. When the *exoneratur* is entered on the bail bond, or the bail is discharged, it is conclusive upon the parties and all interested. *Ib.*

3. Giving bail is not a waiver of the privilege from arrest. *Ib.*

ASSUMPSIT.

1. N. with other persons, signed a subscription-paper, thereby promising to pay to the *trustees* of Troy Conference Academy, or to their order, the sum of one hundred dollars, for the purpose of enabling them to pay the debts of said Academy; one-half by the first of June, 1844, the remaining half in one year thereafter, provided that the sum of twenty thousand dollars was subscribed by the first of January, 1844; the sum of twenty thousand dollars was subscribed by the first of January, 1844, and N. paid one-half of his subscription and then gave notice that he should not pay the remaining half. In an action brought against N., after the expiration of the said year, to recover the remaining half of his subscription, it was held, that the obligation imposed upon and assumed by the trustees of the Academy to see to, and make the application of this money, as directed by the subscribers to this fund, so consummated the contract, that N. could not avoid payment on the ground that there was no consideration for the promise; and that whether the relation each subscriber bears to the other, or to the institution

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itself is considered, N. is estopped from denying the obligation of his contract. *Troy Academy* v. *Nelson*, 189.

2. The amount of the consideration is unimportant, and it is not necessary in this State, that it should appear upon the face of the contract or agreement, as it may be proved by testimony *aliunde*. *Ib.*

3. In case of a mere executory contract to sell and to buy on a certain day, where each promise is the entire consideration for the other promise, neither party can maintain an action, without avowing a readiness to perform on his part at the time and place, or an excuse, by the act of the other party. *Perry et al.* v. *Wheeler*, 286.

See PROMISSORY NOTES.

ATTACHMENT.

1. An attachment creates a *lien*, and places the property in the custody of the law to respond the judgment and execution that shall be obtained thereon; and as against subsequent attachments, the rendition of a judgment in due form and course of law, is as necessary as the attachment itself. So is also, the issuing of an execution on that judgment, and duly charging the property therewith. *Brandon Iron Co.* v. *Gleason*, 228.

2. And if several creditors attach the same property, and the first attaching creditor, (his claim being large enough to absorb all the property,) by an agreement with the debtor, takes all the property in satisfaction of his claim, and discontinues his suit; though by this agreement his title may be good as against the debtor; as against the subsequent attaching creditors, who perfect their *lien*, by judgment and execution, it will give no title to the property, and can have no effect, unless their assent was also obtained. *Ib.*

3. So, also, if the attaching officer permits the property to pass into the hands of the first attaching creditor in satisfaction of his debt, under such an agreement, the officer is not protected by this application of the property, and it is no legal accounting for the same, therefore he will be held liable to the subsequent attaching creditors who perfect their *lien;* the first attaching creditor having lost by the discontinuance of his suit, the *lien* created by his attachment, and by the agreement acquired no title or claim to the property, as against the officer or subsequent attaching creditors. *Ib.*

4. Property attached on *mesne* process, is by statute held to respond the judgment, and the officer is entitled to the custody and possession of the same; therefore, in a suit, against the town, for the neglect of the constable, so to hold the property, it is not competent, for the town in mitigation of damages, to show "that "the creditor may, still, by a new process or new execution, obtain satisfaction "of his debt;" for the creditor has a right to proceed against the specific property attached until his judgment and execution is satisfied. *Bowman* v. *Barnard*, 355.

AUDITA QUERELA.

1. The writ of *audita querela*, is an important remedial and equitable process, and should be allowed in cases where an execution has been irregularly issued, and from which the party should be relieved, and it should at least be a concurrent remedy, with that relief which is granted on motion. *Porter* v. *Vaughn*, 211.

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2. The complainant brought his writ of *audita querela*, and upon *demurrer* it was held, that where an execution has been issued from a court of law, this writ cannot be sustained, to vacate the same, or suspend its operation, on the ground that it has been enjoined by the court of chancery, and that the remedy of the complainant is only to be found by application to the chancellor. *Ib.*

3. When the basis of an *audita querela* is altogether personal, it will die with the person. *Conn. & Pass. Rivers Railroad Co.* v. *Adm. of Bliss*, 411.

4. And in such a case, the bail upon the recognizance cannot be held. *Ib.*

5. Writs of error and *audita querelas*, when they go to the foundation of the judgment, may be prosecuted by executors and administrators. *Ib.*

AUDITOR. *See* BOOK ACCOUNT 5, 8, 9.

AUTHORIZED OFFICER. *See* PROCESS.

AWARD.

That which is properly submitted to be decided by the discretion of a man or board of men, when so decided, cannot be revised by another tribunal. *Conn. & Pass. Rivers R. R. Co.* v. *Bailey*, 465.

BAILMENT.

1. Where by the terms of a written contract, B. has no power to sell a horse that A. has conditionally put into B.'s hands. If B. sells the horse, the very act of sale terminates the bailment, and A. has a right to take immediate possession, even if part of the purchase money has been paid, and retain it until the balance of the purchase money is paid. *Dunham* v. *Lee*, 432.

2. And if B. had a right to sell, and the sale was so tinctured with fraud as to be voidable at the election of B., then A., as principal vendor, might do it. *Ib.*

BAIL. *See* ARREST 1, 2, 3; AUDITA QUERELA 4.

BASTARDY.

1. The statute, in terms, requires that the original papers should be returned to the county court, in cases of this kind; but if copies are returned, and not objected to, it is the same as if copies had been substituted by order of the court. *Ramo* v. *Wilson*, 517.

2. The omission of the complainant to sign the complaint at the bottom, if objected in proper time, might be good cause for quashing the proceedings, but after verdict, this omission cannot be regarded as one of substance. *Ib.*

3. All defects in form, in a case of this kind, are cured by verdict. *Robie* v. *McNiece*, 7 Vt. 419. *Ib.*

BOND. *See* SCIRE FACIAS 1, 2; PROBATE COURT 7, 8

BOOK ACCOUNT.

1. The statute, defining and limiting the jurisdiction of the several courts in this State, in the action of book account, has reference to the *debit* side of the book,

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at the commencement of the suit, and if the court had not jurisdiction at that time, no subsequent act or dealings between the parties, will confer jurisdiction. *Shepherd* v. *Beede and Tr.*, 40.

2. Chapter 39, and Section 9, of the Compiled Statutes of 1850, directing the Auditor to examine and adjust the accounts of the parties, to the time of making up the report, has reference to cases commenced before a court having jurisdiction of the case, at the time the suit is commenced. *Ib.*

3. If the case is not within the jurisdiction of the court, at the time of the commencement of the suit, the same will, on motion, be dismissed in any stage of the proceedings. *Ib.*

4. The wife, after marriage, and while living with her husband, is incapable of contracting a debt against herself, nor can she claim the benefit of credits upon a debt that she contracted before her intermarriage, except as payments made by her husband upon her debt. *Farrar* v. *Bessey et ux.*, 89.

5. Where the auditor simply states, that the account of the defendant is disallowed, without the facts or grounds upon which the disallowance proceeded, and it not appearing that the auditor was requested to state the facts found by him, in regard to the defendant's account,—*held*, that one of these things is indispensable, to show sufficient ground to set aside the report. *Wait* v. *Johnson*, 112.

6. The plaintiff in an action on *book account* is not at liberty to become *nonsuit* after judgment to account, and after the case goes before the auditor. *Lyon* v. *Adams*, 268.

7. Where the defendant, and one Miles, made an agreement, in which defendant was to let Miles have a hog, provided he would pay him therefor, and for a previous account, in salts; and the defendant also agreed with the plaintiff, in the presence of said Miles, to let him have the same hog, in exchange for salts, if any thing should happen that Miles did not take it; about three weeks after this contract, the plaintiff took two boxes of salts to defendant's store; after they had weighed one box, and were getting in the other, plaintiff inquired of defendant, if he was going to send the hog, and was informed that there was not salts enough to pay Miles' debt and for the hog, and that he should not send it. The plaintiff then, and before the delivery was perfected, claimed the salts as his own; the defendant informed plaintiff, he should hold them on the contract he had made with Miles, and pass them to his credit. The plaintiff refused so to deliver them, and demanded the property or payment for the same. Miles was not present, and nothing appeared to show that he ever spoke to plaintiff to deliver the salts for him. Under this state of facts, *held*, that defendant was bound to restore the salts, or that plaintiff might treat the property as sold, and charge him accordingly, and that plaintiff might recover for the same in this form of action. *Waterman* v. *Stimpson*, 508.

8. The balance found due by the auditor, is conclusive, so far as the account is concerned, on both parties, if no exception is taken to the ruling of the auditor in ascertaining that amount. *Curtiss* v. *Greenbanks*, 536.

9. A question of fact decided by the auditor, and ultimately by the county court, cannot be revised by the supreme court, unless they find that there was no testimony tending to prove the fact. *Harrington et al.* v *Edson*, 555.

See AGENT 7, 9.

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BOUNDARIES.

Where the premises are described by reference to the *lines* and *lands* of adjacent proprietors, and the calls of the deed can be answered, and the land in dispute be included or excluded, and the quantity of land which the parties intended to mortgage was a lot containing about forty acres, as expressed in the deed, and this statement is verified only by including the land in dispute in the mortgage, this circumstance in the absence of all possible motive not to include it with the remainder of the lot, the whole lot will be considered as covered by the mortgage, when such construction answers all the calls of the deed, and manifestly carries into effect the intention of the parties. *Pierce* v. *Brown*, 165.

CERTIORARI.

The application for the writ of *certiorari*, is addressed to the discretion of the court, and will not usually be granted unless the substantial justice of the case requires this remedy. *Rockingham et al.* v. *Westminster*, 288.

CHANCERY.

1. Though the liability of sureties is governed by the same principles at law, as in equity, a court of equity will not send a party sueing there, to a court of law for a discharge or relief; but will extend the same relief, and exercise the same powers, in behalf of sureties, that were exercised before jurisdiction of this subject was entertained at law. *Viele* v. *Hoag*, 46.

2. Nor is it in the power of a creditor, by first commencing proceedings at law, to deprive the surety from seeking his relief in chancery; and when there has been no delay or negligence in seeking relief in equity, a court of chancery will exercise a controling power over the parties in their proceedings at law. *Ib.*

3. If a bill is brought for discovery, merely, in aid of proceedings at law, and the discovery fails, the bill will be dismissed. *Ib.*

4. Sureties on a note are not discharged, where time has been given, if there has been a reservation of the right to call for payment, or a right to proceed against the surety. *Ib.*

5. When a case stands on bill and answer, and the answer is not traversed, the allegations which the defendant makes by way of belief, comes within the general rule, and in such case, the answer is to be taken as true. *Gates* v. *Adams et al.*, 70.

6. Important and cardinal matter in a defense should be in some way alledged, and not be left to inference, merely. *Ib.*

7. The plaintiff executed a release in these words,—"This mortgage is discharged, "a second mortgage having been given of other lands to secure the same debt." It was held, that in order to have this release defeat the plaintiffs' right, it should appear that it is a fraud upon the defendants, and executed under such circumstances as to effect the plaintiff with the fraud, and if fraud is not alledged, the court will not presume it, but the contrary. *Ib.*

8. And again, if the defendants would compel the plaintiff, (when several pieces of land are in the mortgage,) to go altogether against one piece of land, they must show such a state of the title, as will enable the plaintiff to get his pay, or else charge him with the release, under such a state of facts and knowledge, as to make it express fraud upon the defendants. *Ib.*

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9. If several parcels of real estate are in the mortgage, the mortgage is to be apportioned upon the land according to value, then give a time for the owner of each to redeem his portion, and upon failure to be foreclosed, and if both or neither redeem, that will end it; if one redeems his portion and the other not, then the one redeeming his own, must also redeem the other, or forfeit the whole estate; and if he does, then he is to be allowed to take the whole estate. *Ib.*

10. The case of *Howe* v. *Chittenden*, 1 Vt. 28, carries the notion of apportioning a mortgage security upon different parcels of the security, further than is altogether consistent with the rights of the mortgagee. REDFIELD, J. *Ib.*

11. The decease of a party an obligor in a bond, and also the holder of notes given by the obligees in the same bond for the same consideration upon which the bond was given, and the mere representation of his insolvency, his estate being confessedly solvent, is no reason why a court of equity should interfere in favor of the obligees, and decide that the amount of the notes should be set off against the sum due on the bond, and render a decree in favor of the obligees for the balance, if any. But if the obligees in the bond, being the makers of the notes, are insolvent, a court of equity will interfere in favor of sureties who signed the notes upon the security of the bond, and will decree a set-off of the amount due on the notes against what was due on the bond. The consideration that the nominal parties to the contracts are not strictly mutual, is not a valid objection to decreeing a set-off in equity, if the real parties upon whom the burden is ultimately to fall, are the same. *Admr. of Smith* v. *Admr. of Wainwright*, 97.

12. Where S. and others bought of W. his interest in, and good-will of, the manufacturing and sale of certain articles, within a certain district, and gave notes to the amount of $8,000 therefor, and W. at the same time executed to S. and the others, a bond "in the penal sum of ten thousand dollars," conditioned to be void "if the said W. shall hereafter wholly refrain from manufacturing and vending," &c., and a breach of said condition by W. was proved; *held*, that under the circumstances of the case, the sum so named in the bond was a penalty, and not liquidated damages. *Ib.*

13. The refusal of the chancellor in the court below to allow a party to file a supplemental bill before the original one comes to a hearing, is not a final decree, from which in the first instance, an appeal lies; nor is it strictly revisable in the superior court, being a matter of discretion. *Ib.*

14. But where such refusal proceeds upon special grounds, which are shown to have been misapprehended, the party, after correcting this misapprehension, will be permitted to renew his application. *Ib.*

15. Where a bond is executed to three persons jointly;—their assigns, administrators, &c., not being named in the bond,—their interest being also joint as purchasers of the business of the obligor of the bond, and the nature of the covenants showed that they were not founded upon any personal confidence in the three persons to whom the bond was executed, and where both parties expected the bond to enure for the benefit of the business sold out, and where the obligor had repeatedly assented to his liability after a change in the parties to whom the bond was executed, a court of equity will hold the obligor liable on his bond, not only for damages accruing from breaches thereof while the original parties to the bond remained unchanged, but for those from breaches after the change of parties. *Ib.*

16. If the signers of a constable's bond, at the time of signing, neglect to affix their seals to the same, and admit that it was their intention to have affixed their seals

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to the bond at the time of signing, the court of chancery will decree that the bond shall be treated as if sealed. *Rutland* v. *Paige et al.*, 181.

17. A cross bill can be sustained only on matters growing out of the original bill. *Slason* v. *Wright*, 14 Vt. 208. *Ib.*

18. If A., B. and C., as co-sureties, execute an official bond with D., as constable of a town, neither of the co-sureties can sustain an action against the town for any default of duty on the part of D. as constable, to himself; nor can one of the co-sureties sustain a bill in chancery against the other two co-sureties, for contribution for such default of D. *Ib.*

19. There is no privity whatever between the creditor and the sureties upon a constable's bond. *Ib.*

20. An officer is not bound to regard the equities subsisting among the debtors, in an execution, nor can he be subjected to a suit in favor of a co-obligor or surety, for any default in enforcing an execution against the principal debtor. *Ib.*

21. When the defendant is not supposed to possess personal knowledge in regard to the facts set forth in the bill, and in his answer does not profess any, the answer is not to be taken as evidence of the truth of its denial, and, therefore, required to be overcome by something more than the testimony of one witness. In such cases it leaves the matter of facts, upon the proofs in the case. *Loomis* v. *Fay et al.*, 240.

22. The surrender of a fictitious or forged bond, held by the creditor, for the benefit of the surety, where the same was of no possible use to the surety, except as a matter *in terrorem*, is nothing for which a court of equity will decree an exoneration of the surety. *Ib.*

23. An indorsement made to a bank under an express written agreement from the president, that the indorser should never be holden upon the indorsement, would be inoperative as a fraud upon the bank; and a parol agreement, to that effect, could not be received to contradict or explain the indorsement, unless to show fraud in the indorser. *Ib.*

24. And even if the fact was fully established in a court of equity it would still impose upon the indorser, the obligation to refund to an innocent purchaser of the note, whatever sum he should be induced to pay out in faith of the indorsement, which was apparently valid and binding. *Quere*, As to how far notice to defendants, of a defense claimed before purchase, will deprive them of this equity. *Ib.*

25. REDFIELD, J. Cases of this kind should be *tried* in the court of chancery before they are brought into this court, &c. *Ib.*

26. An answer in chancery, (where the defendant has no actual knowledge of the points, and does not profess to have any, and is not, either by the form of the bill, or the interrogatories, called upon to make answer to the points,) is regarded in this State, as a mere denial, or traverse of the bill, and this leaves the points, to be proved by the orator, by the ordinary manner of proof. *Wooley* v. *Chamberlin et al.*, 270.

27. And where the defendant, in a bill of foreclosure, is the original mortgagor, his answer is never regarded as evidence to impeach the consideration of the mortgage securities. *Ib.*

28. And even if the answer might under some circumstances, be regarded as evi-

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dence upon the question of the execution of the mortgage securities, including the matter of delivery; it could never be regarded as extending to a subsequent incumbrance, to one who knew nothing of the facts. *Ib.*

29. And estoppel *in pais* is an equitable abandonment of a claim, a kind of perpetual disclaimer, and a party cannot be covertly led into it; he must be made perfectly aware of the interest of the party making the inquiry, or that his declaration is going to be, or will be likely to be relied upon, by some one. *Ib.*

30. Where a note was shown in the orator's possession in October, 1848, and secured by a mortgage duly executed in 1843, and then recorded, and the note bearing that date, it was held entitled to be regarded as having existed and been delivered at that time, so as to make it incumbent upon the defendant to impeach it. *Ib.*

31. One cannot hold property which he receives as a mere gratuity, or as heir, if the property was so conveyed to him to defeat the wife of the deceased, to her right to dower, but he will be held liable in chancery to account for the property so received, and the widow will be entitled to one-third part of such property. *Jenny* v. *Jenny*, 324.

32. Chancery will not relieve against a judgment rendered against one as trustee, on the ground that such trustee, through forgetfulness, failed to attend the court rendering such judgment, and make his disclosure, even though it appear that such trustee would have been discharged upon making such disclosure; when no fraud is imputable to the party obtaining such judgment. *Warner* v. *Onant*, 351.

33. *Query.* Had there been fraud in the transaction, would equity relieve, while the party could have relief by *Audita Querela*, unless brought as a bill of discovery. *Ib.*

34. The grantee, in a deed, which is absolute in its terms, and contains no recital of a trust interest, is as much chargeable as trustee, by the acknowledgment of a trust, in an answer to a bill in chancery brought against him, as though the deed contained an express declaration of the trust. *Barron* v. *Barron et al.*, 375.

35. Where one buys land in the name of another, and pays the consideration money, the land will generally be held by the grantee in trust for the person, who so pays the consideration. *Ib.*

36. The property of a married woman, whether acquired by gift, devise or inheritance, before or during coverture, is regarded, in equity, as the property of the wife, and not of the husband, for the purpose of securing to her a provision for her support; and if that right has not been expressly and formally waived or forfeited by misconduct, it will be protected in equity against the husband in any proceedings, which may be adopted at law, or otherwise, for the purpose of reducing it to his possession, and will be equally protected against his assignees, or creditors. *Ib.*

37. The amount embraced within this equity of the wife, rests in the discretion of the court. *Ib.*

38. Where money, to which a married woman was entitled by inheritance from the estate of her father, was in the hands of the administrator at the time of the marriage, and it was agreed between the husband and wife and a third person, that a farm should be purchased, and paid for from such fund, and the deed thereof taken by such third person, to hold in trust for the wife, and this agreement was

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made and carried into execution, for the purpose of preserving the property, as the separate estate of the wife, and the price of the farm was in part paid by the administrator personally, from money in his hands, and in part paid by money which was delivered to the husband by the administrator, and received by the husband, for the express purpose of being applied towards the purchase of the farm, under the previous arrangement above mentioned; *it was held*, that a court of equity would protect the whole, as the property of the wife, and that she was to be regarded as the sole *cestui que trust* under the deed. *Ib.*

39. The mere receiving, by the husband, of the property of the wife, will not be such a reducing of it to his possession, as will affect the wife's right of survivorship, or equity to a settlement, unless it be received by the husband solely in the exercise of his *marital* rights, and for the purpose of its appropriation to his own use. *Ib.*

40. Courts of equity for many purposes, treat husband and wife as distinct persons; capable of contracting with each other, and of having separate estates, debts, and interests, and, as a general rule, whenever a contract would be good at law, when made with the trustees for the wife, that contract will be sustained in equity, when made with each other, without the intervention of trustees. *Ib.*

41. A *post nuptial* agreement between husband and wife, without the intervention of trustees, by which the wife renounces all further claim upon the husband for his services, or support for herself and children, and agrees, that she will contract no debts on his account, and the husband all claim for her services, or support, will be sustained in equity, so far as it has reference to the property of the wife, not only against the husband and his heirs; but against all others claiming under him, who, at least, were not creditors at the time the agreement was made. *Ib.*

42. If there is no jurisdiction whatever in the probate court, it would not lay the foundation of any resort to a court of equity. *French et al.* v. *Winsor*, 402.

43. One who is administrator of an estate, against which he has claims, may bring in his claims against the estate, on his final accounting in the probate court, or present them to the commissioners at his election. *Ib.*

44. *Quere.* How far the orator is entitled to redress, in this suit, for his services as attorney in fact, of the intestate, if such claim should be finally disallowed in the probate court. *Ib.*

45. Where one, in faith of a license, enters and occupies for more than fifteen years, as his own, this will give him an equity against the whole world, to be reimbursed for the value of his erections, to the person taking them, before he could be deprived of them. *Pope* v. *Henry et al.*, 560.

46. Possessions taken under a license to occupy permanently, either absolutely, or upon certain conditions, gives, in equity, a title to the premises, according to the terms of the license. *Ib.*

47. And the party being in possession under the license, is notice to a subsequent purchaser, or incumbrancer of whatever title, the one in possession may have, whether legal or equitable. *Ib.*

48. The going into possession of land, under a parol gift, and remaining quietly in possession for fifteen years, gives good title, by the mere acquiescence of the donor or owner, whoever he may be. *Ib.*

49. A partition between co-tenants, made and acquiesced in for more than fifteen

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years, becomes absolutely perfect at law, and if it were not so, a court of equity would decree its perfection. *Ib.*

50. Any title subsequently acquired, by the grantor, who conveys by warranty, will enure to the benefit of the grantee. But grants made by the grantor, or conditions, or limitations, or estoppels subsequently attempted to be annexed to the estate, will not affect his grantee. *Ib.*

51. A mortgagee may legally hold two mortgages, on different pieces of land, for the security of the same debt, and may foreclose his mortgage on one piece, without the other; and whether a foreclosure on one will bar a foreclosure on the other, depends upon the value of the premises foreclosed. *Burpee* v. *Parker et al.*, 567.

52. If the land foreclosed is equal in value to the debt, the debt is thereby paid, and the remaining premises are relieved from any further claim as security. *Ib.*

53. There should, to justify a bill of interpleader, be either some specific chattel, or some definite sum of money, to which different parties in the same right, or in priority of estate, make claim, and the person bringing the bill, should be a mere stake holder, having no interest in the matter; so that when the court decree an interpleader, the plaintiff can step out of the case altogether. *Lincoln, Admr.*, v. *Rut. & Burl. R. R. Co. et al.*, 639.

54. And where an administrator, who was also an heir to the estate, brought a bill in chancery, setting forth, among other things, that the commissioners allowed a claim against the estate, in favor of the Rutland and Burlington Railroad Company, for $1,000, being for ten shares of corporation stock, and that orator at the time did not deem it his duty to appeal, and the time of appeal expired, and since that, said Railroad Company have commenced a suit upon the administrator's bond, to recover this allowance, and that the heirs insisted the $1,000 should be distributed, and that the allowance was made by fraud, and that legal proceedings would be obtained for that purpose, &c.; and that plaintiff is ready to pay it to whomsoever is entitled; and praying that the parties may interplead and orator may be allowed to deposit the $1,000 in court, to be disposed of as the judgment of the court may direct; and also praying for an injunction. Upon general demurrer, it was held, that the facts alledged will not entitle the plaintiff to relief, nor will the facts lay the ground of an independent jurisdiction in equity, for a bill of interpleader. *Ib.*

CHARGE TO JURY, *See* PRACTICE; DEED 8.

CONDITION PRECEDENT, *See* SALE 1; CONTRACT 7.

CONSIGNOR AND CONSIGNEE, *See* AGENT.

COLLECTOR.

1. The neglect of a collector of taxes to make return in writing, of his proceedings on his warrant, can have no effect to make him a trespasser *ab initio*. Nor is he bound to certify such return to the person whose property has been taken to satisfy such tax, even though requested so to do, by the owner of such property, and such return if made, would not be proper evidence in his justification. *Spear* v. *Tilson*, 420.

2. In all cases the proceedings of the collector may be proved by parol, when necessary to his justification. *Ib.*

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3. Such officer may lawfully adjourn the sale of such property, and his powers for that purpose, are identical with those of an officer having an execution for collection. *Ib.*

CONTRACT.

1. Where the plaintiff recommended himself as a competent workman and undertook to work as a master-builder, and through negligence or unskilfulness the defendant suffered loss, to a greater amount than the sum due for his services at the stipulated rate, held, that the plaintiff cannot recover for his labor. *Goslin* v. *Hodson et al.*, 140.

2. A contract made and completed on Sunday, without any subsequent act or promise ratifying the same, is void. *Sumner* v. *Jones*, 317.

3. But where S., on Sunday, sold a horse to J., for which J. on the same day gave S. his note, and afterwards made two payments upon the note, and retained the horse without offering to return the same, it was held, that these payments upon the note accompanied with the retention of the property was a subsequent rati fication of the contract, and that S. was entitled to recover the balance due upon the note. *Ib.*

4. Where the plaintiff contracted under seal to perform certain labor upon defendant's road, *by a specified time*, which was subsequently enlarged *by parol*, it was *held*,— that plaintiffs cannot sue in covenant. *Sherwin et al.* v. *Rut. & Burl. R. R. Co.*, 347.

5. A contract under seal cannot be varied by a mere parol contract, whether in writing or not, since such a contract is inferior to the original contract. *Ib.*

6. But written contracts not under seal may be varied; then both contracts, being of the same grade, the whole being set forth, and performance alledged, within the enlarged time, assumpsit will lie. So, too, when the covenants are independent of each other, one may maintain an action, without avering performance on his part. *Ib.*

7. In a contract under seal, if the defendant hinders the plaintiff from full performance of a condition precedent, or if he expressly waive it, under his hand and seal, he is estopped from insisting upon the failure of plaintiff in his defense. *Ib.*

8. Where the plaintiff, as a sub-contractor, under one Belknap, contracted to build a section of defendants' road, and the engineers of the company had authority to direct the removal of earth from one section to another when needed, and by the contract between the company and Belknap, the contractor, he, Belknap, was bound to move earth from one section to another, but no engineer had power to bind the company, (the defendants in this case,) by any contract for grading or removing earth, and if Belknap was required by engineers so to move earth, he could obtain compensation under his contract. And the plaintiff, while at work on the section thus taken of Belknap, was required by an engineer of defendants to move earth from the section he was building to another, under the assurance that defendants would pay for the same, it being extra haul. And this was beneficial to defendants, and plaintiff charged them no more than it would have cost defendants to have procured the earth elsewhere, but it did not appear that defendants ever consented to have plaintiff do it upon their credit, or that they had knowledge that plaintiff was doing it upon their credit; and the plaintiff has no general contract with defendants, their contract for all this work being with said Belknap; under these facts, *it was held*, that plaintiff could not recover of

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the defendants for his labor. It was also held, that there was nothing in the general duties of an engineer, that would authorize him to employ others to do the work on the road, which by express contract belonged to the contractors to do. *Thayer* v. *Vt. Cent. R. R. Co.*, 440.

9. A promise to pay assessments on stock contained in the book of subscriptions, and signed by the defendant, will bind him, notwithstanding the charter provides for a sale of the stock only, in case of a failure to pay assessments thereon. *Conn. & Pass. Rivers R. R. Co.* v. *Bailey*, 465.

10. Parol agreements, made at the time of subscribing for stock, and inconsistent with the written terms of subscription, are inadmissible, inoperative and void. *Ib.*

11. Each subscription is an independent undertaking, and in no way affected by the terms of other subscriptions. *Ib.*

12. Where the commissioners, appointed to receive subscriptions to the stock of a railroad, are empowered to reject such subscriptions before the organization of the company, and do not do so; *held*, that the contract entered into by subscribing for stock, is sufficiently mutual to make it valid. *Ib.*

13. Where the plaintiff's claim was for services of a minor son, under a contract made by the minor, with the defendant, it was held, that the plaintiff is so far bound by the contract of his son, that his claim depends upon a proper performance of the contract, and that he would not be entitled to recover therefor, in violation of the contract so made. *Rogers* v. *Steele*, 513.

14. But where, under the contract, the minor son of the plaintiff was to labor seven months for defendant, for the sum of sixty-seven dollars, and under the further agreement, if the defendant or the minor should find just cause of complaint or dissatisfaction, the contract could be determined by either, by giving two weeks' notice to that effect; and after the minor had worked six or seven weeks, he gave the defendant such notice, but had no just cause of complaint, and the defendant consented that he might leave before the two weeks had expired, if he was determined to leave at the end of that time, and thereupon he left defendant's service; it was held, that this was a mutual relinquishment of the contract, and that, in consequence of the consent thus given, plaintiff might recover for the services rendered. *Ib.*

15. And if the party repudiating the future performance of the contract, has himself received advances, which he declines to pay for in the mode stipulated, it is regarded as equitable that *he* should refund in the usual mode, for money had, and for goods sold, and it is not in his power, without the consent of the other party, to revest the title of the specific things received. *Hawley* v. *Moody*, 603.

16. And it was *held*, that this recovery may be had under the general counts. *Ib.*

17. Where the plaintiff contracted to build "rip rap" wall for the defendants, at fifty cents per cubic yard; there being no general usage or uniform custom proved, which should control the mode of measurement, it was held the term used, implies pay by the cubic yard, for the "rip rap," after the stone is fitted, and laid into wall. *Wood* v. *Vt. Cent. R. R. Co.*, 608.

18. Where the plaintiffs contracted with the defendants, in writing, to build certain bridges on defendants' road, at a certain sum per foot, to be paid one-fourth in cash, and three-fourths in stock of the road at par value, and the contract was entirely silent as to the time or place of payment, *it was held*, that looking to that alone, the plaintiffs could not call for payment, either of the cash or stock, until

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a complete performance of the contract on their part, or at any rate before or any oftener than a bridge was fully complete; nor could they then sue and recover for the stock without proof of a special request and a refusal to deliver it. For if no time be fixed in the contract, or by other agreement of the parties, either express or implied, for the doing of the thing, a request is essential to the cause of action. *Boody et al* v. *Rut. & Burl. R. R. Co.*, (U. S. Circ. Court,) 660.

19. The defendants after the commencement of the suit mortgaged their road to secure the payment of debts due from them to third persons; *it was held*, that the act of mortgaging the road would not work or amount to a disability to perform the contract, or make the defendants liable to pay money in lieu of stock. *Ib.*

20. Where it appeared, that the defendants were in the custom of making monthly payments to their contractors, for work done on their road, upon estimates made by the engineer at the end of each month, and that usage or custom having been adopted with the plaintiffs, *it was held*, that this must be considered the rule of payment under the contract, established by mutual consent, and binding upon the parties. *Ib.*

21. After the making of the original contract, the plaintiffs proposed to put in iron bearings instead of wood, for so much per foot of the bridges, varying like the prices in the original contract, according to the different spans of the bridges, "in addition," as they say, "to the former proposal," thus leaving the mode of payment unchanged, *held*, that it might well be inferred that the mode of paying for the iron bearings was to be the same as that provided for building the bridges. *Ib.*

See PROMISSORY NOTES 4; AGENT 12, 13.

CONSTABLE.

1. A constable derives his official powers, from his election and the statute defining his powers, and he is not required to give bonds, until the selectmen of the town specify the amount, name the securities and request the due execution of the bonds, and he can execute the duties of the office, until these steps are taken, and the request is made; hence, he is authorized to make an attachment, and the town is responsible for his neglect to deliver property, thus attached, on the execution when demanded. *Bowman* v. *Barnard*, 355.

See ATTACHMENT 4; COLLECTOR; SHERIFF 6.

CORPORATION.

1. The act establishing the Pawlet Manufacturing Company, was passed November 7, 1814. Section 5 of the said act contains the following provision: "That the "persons and property of said corporation shall be holden to pay their debts, "and when any execution shall issue against said corporation, the same may be "levied on the person or property of any individual thereof." It was *held*, that this provision imposed upon the corporation a primary liability, and upon the stockholders a liability subordinate to and depending upon the liability of the corporation, and is a liability carved out and existing by the statute, and can have no existence independent of its provisions. *Dauchy et al.* v. *Brown et al.*, 197.

2. It was also *held*, that when a statute thus creates a liability and provides a remedy, the creditor is as much bound to resort to the act for the remedy given, as

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for the liability imposed for his security; and that in no case under such circumstances can the remedy be considered cumulative. *Ib.*

3. And it was further *held*, that when the statute provides that an execution issued against the corporation may be levied on any individual thereof; it implies a positive requirement, that such proceedings shall be had against the corporation upon which execution can issue, as a preliminary step, before proceedings can be had against the stockholders, for the indebtedness of the corporation must exist before the liability of the stockholders can arise; and that indebtedness can only be tried in a suit against the corporation in such a way, that those upon whom the execution may be levied shall be thereby concluded. *Ib.*

4. If a stockholder of such a corporation fraudulently dispose of his stock to avoid his liability, such transfer as against creditors will be absolutely void. *Ib.*

5. Such a corporation may connect the business of a store with the ordinary business of the corporation, and if the business is transacted in the name of the corporation, and for corporate benefit, and a creditor transacts business with them in that capacity and trusts the corporation for goods, he must enforce his claim against the corporation before the stockholders can be made liable, and cannot sustain an action against the stockholders individually. *Ib.*

6. A Corporation will not lose its corporate existence by having ceased to do business after April, 1841, to February, 1852, and by disposing of their personal property, and neglecting to choose corporate officers in that time; and though a legal surrender may *be presumed*, where for a sufficient length of time, there has existed an entire *non user* of corporate franchises, and a neglect to choose corporate officers, still, the lapse of time required for that purpose has never been decided in this State. *Brandon Iron Co.* v. *Gleason*, 228.

See FORFEITURE 2; AGENT 1, 2, 3.

COVENANT, *See* CONTRACT 4, 6.

CRIMINAL LAW.

1. One indicted for *manslaughter* may, on trial, be convicted for an *assault and battery*, though the indictment contain no count specially charging the minor offense. *State* v. *Scott*, 127.

2. A single act of selling spirituous liquor, without license, constitutes an offense, under the statute of 1846. *State* v. *Bugbee*, 22 Vt. 32. *State* v. *Paddock*, 312.

3. If an information sets forth the offense in the words of the act it is sufficient; and where an information for a violation of the license law, set forth that the respondent sold distilled spirituous liquors, in a less quantity than twenty gallons, and in quantity of one pint and more, it was held sufficient to prove the offense under each count, as specific as stated; and evidence that the respondent sold distilled spirituous liquors, in quantity of one pint or more, and less than twenty gallons, was all that is required. *Ib.*

4. And where the court, upon such an information, containing one hundred counts, "directed the jury to return a verdict of guilty for each act of selling;" it was held, that though the jury are the ultimate judges of both the law and fact, there was no error in the charge, as it must be considered an expression simply of the opinion of the court, of the law in the case. *Ib.*

5. Where an information, containing one hundred counts, each count having a dis-

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tinct caption, and was only signed at the close of the last count, and upon the last page, but the pages were connected together, the information was held sufficient. *Ib.*

CUSTOM.

There is no such uniformity, in the custom or usage of giving executions to the same officer making the attachment, that it can be regarded as evidence to show that the officer made the attachment, nor can it be regarded as evidence to show a particular and substantial fact. *Angell* v. *Keith*, 371.

See ACCOUNT 1; CONTRACT 17, 20.

DAMAGES, *See* GRAND LIST 3, 4.

DEED.

1. Where the mortgagee left his mortgage with the town clerk for record, and the clerk recorded the same at length, and so certified upon the mortgage, but made no alphabet or index of the said mortgage, it was held, that the mortgage was properly recorded within the meaning of the statute, and that the alphabet or index constitutes no part of the record, and the mortgage became an incumbrance upon the land from the time it was transcribed upon the record. *Curtis et al.* v. *Lyman et al.*, 338.

2. The registry of a defective deed is constructive notice to no one. *Pope* v. *Henry et al.*, 560.

3. It is the duty of the town clerk to certify a copy of the record, and if he certifies the copy to be "a true record of the deed, recorded in his office," it appearing from the copy that such a record existed in the office, it will be intended that the clerk certified from the record. *Preston* v. *Robinson et al.*, 563.

4. The deeding of a given number of acres to one man, and another number to another, thus conveying the whole right to both, there being nothing to show that the land was intended to be conveyed in severalty, will create a tenancy in common, and they will hold in common, in proportion of the number of acres specified in their deeds. *Ib.*

5. And even if the deeds showed that A.'s right lay in severalty, and the other owner, B., did not object to A.'s acts of possession, C., a mere stranger, could not, and C.'s intrusion might justly be regarded as a violation of A.'s possession. *Ib.*

6. So, too, A.'s contract to purchase the right of B., would enable A. to refer his acts upon the land to B.'s deed, in order to determine whether they were to be regarded as possessory, or mere torts; it has often been so decided, where the license to enter was in writing, and the same results would follow when the contract is not in writing. *Ib.*

7. When the deed describes the land, as being within the original charter limits of a town, we are to look to the charter for the right, and then to the right for its severance, and there identify the subject matter. This may always be done by parol, and it is not affected by a change of the name of the town, or setting a portion of it to another town. *Ib.*

8. When there are facts important to be considered in giving a construction to a

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deed, and those facts are in dispute, it may properly be submitted to the jury, under a hypothetical charge of the court. *Ib.*

See DONATIO MORTIS CAUSA 1.

DEPOSITIONS.

1. *Ex parte* depositions, taken to be used before auditors, are not required to be filed thirty days before the hearing; and where the case, in a caption to a deposition taken to be used before an auditor, was described as "to be tried by the county "court, at the term next to be holden, &c.," it was *held*, to be a sufficient description of the time and place of trial, and that the deposition was properly received. *Churchill* v. *Briggs*, 498.

DEMURRER, *See* PLEADING.

DEPUTY SHERIFF, *See* SHERIFF.

DEVISE, *See* DONATIO MORTIS CAUSA; CHANCERY.

DONATIO MORTIS CAUSA.

1. A gift of real estate cannot be sustained as a *donatio mortis causa*. *Meach* v. *Meach et al.*, 591.

2. A gift of all the donor's personal property, in prospect of death, is a valid *donatio mortis causa*. *Ib.*

3. M. being desperately sick, in prospect of death, executed to his wife, a deed in the common form, of all his real estate, and at the same time executed a separate deed to her, of all his personal property, consisting of the stock on his farm, and choses in action. Both deeds were duly recorded. M. continued hopelessly sick for a little more than a month after the execution of the deeds, when he died. Upon a bill for a specific performance, it was *held*,— 1st, That the deed of the real estate could not be sustained as a *post-nuptial* settlement, nor could it be construed and carried into effect as a testamentary disposition of the donor's property, it not being within the Statute of wills, nor as a *donatio mortis causa*. 2d, That the deed of the personal property was valid as a *donatio mortis causa*. *Ib.*

4. The question of what amount of property can pass by a *donatio mortis causa* considered. *Ib.*

DOWER, *See* CHANCERY 31.

EJECTMENT.

1. The estate and right of possession are given to the mortgagee by our statute, after condition broken, and he may after condition broken, sustain his action of ejectment, against the mortgagor or his grantees, without notice to quit. *Pierce* v. *Brown*, 165.

2. Upon the death of a mortgagee before foreclosure, his right and interest in the mortgaged premises vest in his executor or administrator, to be administered as assets belonging to the estate. *Ib.*

3. Where A. was tenant under the mortgagor, and afterwards purchased the mortgage, (after condition broken,) and at the same time notified the mortgagor that

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he held the premises under the mortgage, it was held, that this was a repudiation of the tenancy, and a dissolution of that relation, and that his possession thereafter was adverse, and that there was no necessity of surrendering the possession to the mortgagor, and then bringing his action of ejectment, for A. had such title and possession, as would enable him to sustain an action for trespass committed while holding such adverse possession. *Ib.*

See FORCIBLE ENTRY AND DETAINER 2.

ESTOPPEL.

1. Estoppels, to be available, where there is more than one party, must be mutual, and can only operate upon the parties to the issue, and those who stand in privity of estate or descent. *Wright* v. *Hazen et al.*, 143.

2. If one has a special interest in property, which he, by deed, duly executed, releases and discharges, he will after that time be *estopped* from setting up that interest. *Walworth* v. *Readsboro*, 252.

See SALE 4, 5; LIMITATIONS 3; ASSUMPSIT 1; CONTRACT 7.

EVIDENCE.

1. In an action upon a receipt for property attached, a deputy sheriff, to whom the execution was delivered, is a competent witness to testify that he made a seasonable demand of the property of the officer who made the attachment, and of the receiptor of the property so attached. *Ferris* v. *Smith*, 27.

2. The plaintiff offered, as proof of an acknowledgment of the defendant, (a letter dated March, 1845, written by the defendant to the plaintiff's wife, after her marriage, she having signed a note with the defendant before her marriage,) that the plaintiff's wife signed the note as his surety, that he was under obligation to pay the note. It was held,— that the evidence should pass to the jury, under instructions from the court, as to the law arising from the facts, as they shall find them to exist from the evidence. *Little* v. *Keyes et al.*, 118.

3. It is immaterial when an acknowledgment of an instrument is made, if done when offered, it may be read in evidence. *Pierce* v. *Brown*, 165.

4. The old rule, that the witness must be able to swear from memory, is now pretty much exploded, and all that is now required is, that the witness shall be able to state that the memorandum is correct; he may then read it. *Downer* v. *Rowell*, 343.

5. The declarations and conversations of A. and the maker of the note, in relation to the transfer, if a continuing negotiation, and said between the parties during the arrangement, are admissible, as part of the *res gestae*. *Marsh* v. *Davis et al.*, 363.

6. But if such transfer was for the benefit of B., as a particular creditor of A., and a preference merely, among his creditors, it is not fraudulent. *Ib.*

7. Testimony to rebut the inference of fraud arising from the negotiation and transfer of the note is admissible. *Ib.*

8. The indorser of a promissory note is a competent witness to prove the note void in its inception, when he is not shown to be directly interested in the event of the suit. *Pecker* v. *Sawyer*, 459.

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9. The best proofs of the proceedings of a foreign court, are the original records; but the testimony usually produced, is either a sworn copy, by one who has compared it with the original proceedings, or an exemplified copy, certified by the clerk and the presiding judge, and the seal of the court, with the broad seal of the province or kingdom, to the appointment of the judge, with the proper certificate from the office of appointment; either of these will be sufficient. *Spaulding et al.* v. *Vincent*, 501.

10. Proof of the written law of a foreign country, may be by some copy of the law which the witness can swear was recognized as authoritative in the foreign country, and which was in force at the time. *Ib.*

11. And where a discharge in bankruptcy is plead, and a new promise replied, it is not competent for the plaintiff to prove a new promise by his own oath. *Ib.*

12. No different proof of the appointment of an officer in a foreign country, is required, from that at home; proof of one exercising the office *de facto*, is usually sufficient in either case. *Ib.*

13. In an action of trespass for property, which the defendant claimed was fraudulently purchased by the plaintiff, it was held, that testimony of other fraudulent dealings between the parties about the same time of the one in question, is admissible, and should go to the jury. *Pierce* v. *Hoffman et al.*, 525.

14. In an action, in favor of the indorsee, on a promissory note dated in New York, and made payable in Orwell, Vermont, where the indorsee resided, the maker and indorsors all residing without this State, the said note being protested for nonpayment, at the Bank of Orwell. It was held, that the certificate and formal protest of a deceased notary were admissible as evidence of demand and notice. *Austin* v. *Wilson et al.*, 630.

15. It was also held, that it is not essential, that the entire record of the notary should be made at the very moment of the transaction, but it is sufficient if done within a few days, in the ordinary course of business. *Ib.*

See Promissory Notes 5; Sale 3; Assumpsit 2; Attachment 4; Collector 2; Grand List 6, 7; Deed 6, 7; Practice 11, 12, 21; Patent 3.

EXECUTION.

1. An execution *prima facia* should follow the writ. *Wright* v. *Hazen et al.*, 143.

2. If new facts arise before the issuing of an execution, by which the debtor is entitled to have it issue against his goods and chattels only, he may pursue his right on *habeas corpus*. *Ib.*

3. If there has been a stay of execution, and the party prevented from issuing the same, execution may issue after the year, without *scire facias*, and if a judgment be with *cesset executio*, by agreement until such a time, there need be no *scire facias*, until a year and a day after the time agreed upon, even though such *cesset* is not entered upon the roll. *Porter* v. *Vaughn*, 211.

See Attachment 1.

EXECUTORS AND ADMINISTRATORS, *See* Administrators; Probate Court.

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EXCEPTIONS.

1. A case brought into the Supreme Court on exceptions, is heard and decided as if it were pending upon a writ of error. *Blodgett* v. *Adams*, 23.

2. The plaintiffs took an appeal from the commissioners on the estate of S. R. Wales, but neglected to file, in the county court, a certified copy of the proceedings in the probate court, with proper evidence that notice of such appeal has been given to the adverse party according to the order of the probate court, as provided by statute, and also for the period of about six months no notice was given to the adverse party, of such appeal. The county court, on motion, dismissed the cause as being irregularly in court. Upon this state of facts, it was held, that if the court below, in the exercise of their discretionary power, have refused to retain the case, and have ordered it dismissed, that decision must be conclusive between the parties, and cannot be re-examined by the supreme court on exceptions. *Rut. & Burl. R. R. Co.* v. *Adm'r of Wales*, 299.

See PRACTICE 16.

FACTOR.

1. In absence of special directions as to price, a factor is to sell for the fair value or market price; and if the factor acts in utter disregard of his duty as factor, by selling at an under price, he will be compelled to account for the goods at their fair value or market price. *Bigelow et al.* v. *Walker*, 149.

2. Where A. turned out or pledged goods to B., with an understanding that B. should dispose of them through the agency of a factor, and credit A. the amount of sales, and B. committed the goods to a factor to be sold, and took his receipt for them, it was held, that B. was the proper party to resort to the factor for the performance of his contract. *Ib.*

3. And it was also held, that whatever amount was rightfully due from the factor may be considered in the nature of a fund provided by A., to be applied in satisfaction of his indebtedness to B., and that B. was not at liberty wholly to disregard it, and claim the entire balance of his debt of A., as if no such means of satisfaction had ever been at B.'s command. *Ib.*

See AGENT.

FALSE IMPRISONMENT, *See* JUSTICE OF THE PEACE 1.

FORCIBLE ENTRY AND DETAINER.

1. Where a tenant entered upon the farm of the lessor, under a contract, or parol lease, for one year with the stipulations, that he would carry on the farm in a good husband-like manner, build a certain piece of fence, cut certain bushes, gather the stones in a particular field, feed and take care of lessor's cattle upon said farm, and not cut growing timber upon said farm for fuel, &c.; it was held, that evidence proving a breach of such stipulations, will not sustain an action on the statute for "forcible entry and detainer," and entitle the lessor to recover the possession of the premises, before the expiration of the year. *Hadley* v. *Havens*, 520.

2. Chapt. 44, § 30 of the Comp. Statutes, provides, "that when the lessee of any "lands, whether by writing or parol, shall hold possession of the same *without*

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"*right*, after breach of any stipulations contained in the lease by the lessee, the "person entitled to the possession may be restored, &c." It was held, that the evident intention of this act, was to give summary relief in those cases, where, for breach of such stipulations, the action of ejectment would lie. *Ib.*

FORFEITURE.

1. Courts will not presume any fact that works a forfeiture of an estate. *State* v. *Atkinson et al.*, 448.

2. That which would operate to forfeit a charter granted by the legislature, cannot be taken advantage of by a stockholder of the corporation, in an action brought against him for the recovery of assessments on his stock. The State alone can claim such forfeiture. *Conn. and Pass. Rivers R. R. Co.* v. *Bailey*, 465.

FOREIGN COURT, *See* EVIDENCE 9.

FOREIGN LAWS AND OFFICERS, *See* EVIDENCE 9, 10, 11, 12.

FRAUD, *See* CHANCERY 7, 8, 23; EVIDENCE 6, 13; BAILMENT 2; PROMISSORY NOTES 10.

GRAND LIST.

1. Under the present law, the alterations made in the grand list of the several towns, by the committee of the legislature to make the State average of the grand list, only affect State taxes. *Spear* v. *Braintree*, 414.

2. Where the errors and defects in the list are accidental or *bona fide*, it will not render the list void, as a basis of taxation. *Ib.*

3. And in an action for money had and received, or in case, the plaintiff cannot recover more than his actual damage resulting from the irregularity in the list. *Ib.*

4. In an action for money had and received, even where there is irregularity, the plaintiff cannot recover of the town for money paid for State taxes, or State school taxes. *Ib.*

5. The provision in the statute in regard to the sixth column of the list has reference to a time prior to the county average, being required to be deposited, by the listers in the town clerk's office, before the first of July, and the clause of the statute that says, that this shall be the amount upon which all taxes shall be assessed, has reference to those years in which there is no appraisal of real estate, or else it is to be qualified by what follows, that the county average shall be added or deducted for all taxes, and the State average, for State taxes. *Ib.*

6. It was not necessary that listers should make oath to the correctness of the grand list, prior to 1841. *Spear* v. *Tilson*, 420.

7. The existence and contents of a grand list which is lost or destroyed, may be proved by parol. *Ib.*

See LISTERS 4.

GUARDIAN, *See* PROBATE COURT.

HABEAS CORPUS, *See* EXECUTION 2.

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HIGHWAY.

1. Towns must, when railroads obstruct their highways, provide a suitable and proper by-way for the public to pass around the obstruction, and use proper and reasonable precaution to divert the travel from such highway or by-way while they remain unsafe for the public use. *Batty* v. *Duxbury*, 155.

2. And though the railroad be bound to make the by-way, and fail to make it safe for public use, this will not exonerate the town from liability, for the town is primarily liable to the traveler. *Ib.*

3. Such by-way is an open public way for the time being, and the town must make it reasonably safe for the public travel, or see that it is made so by others. *Ib.*

4. Towns are bound, after having reasonable notice of the existence of obstructions in their highways, to remove them or make safe by-ways to pass around them, or to see that they are properly made by others. *Ib.*

5. There is no necessary privity between the traveler and any one but the towns, as to the sufficiency of the highways. The towns must look to those who obstruct their highways for redress. *Willard* v. *Newbury*, 22 Vt. R. 458, confirmed. *Ib.*

6. The 28th Section of Chap. 22 of the Compiled Statutes of 1850, provides, "That "when the public good, or the necessity and convenience of the inhabitants re "quire a highway to be laid out, *on the line between two towns*, any seven or more "freeholders may make application to the selectmen for that purpose." And the 44th Section of the same Chapter provides, "That if the selectmen of such "towns shall neglect or refuse to lay out such highway, and in no other case, "any seven or more freeholders may make application to the county court for "the appointment of commissioners for that purpose." Under the provisions of these two sections, it was held, that commissioners had conferred upon them the same powers, and the performance of the same duties, and none other, that were given to the selectmen under such petition, when pending before them. *In the matter of Bridport*, 176.

7. And where the road petitioned for is wholly in one town, and upon the refusal or neglect of the selectmen of said town to lay such road, commissioners are appointed by the county court, it was held, that the powers of the commissioners in such case, are co-extensive with those of the selectmen of the town, and that the commissioners can only act within the territorial limits of the town. *Ib.*

8. Where commissioners appointed under the provisions of Sections 28 and 44 of Chapter 22 of the Compiled Statutes of 1850, laid the road wholly in one town, and it appeared from their report that the road could, except for a short distance in one or two places, as well have been laid *on the line of both towns* as by the side of said line, it was held, that the commissioners exceeded their power and authority, and that the proceedings of the county court establishing a highway so laid, on petition, would be set aside. *Ib.*

9. Commissioners, appointed under the statute, to apportion to towns the share of expense each shall bear, in the construction of bridges and roads, where one town is found to be excessively burdened, by defraying the whole expense, and other towns are benefitted by the construction of the same, cannot make an apportionment in specific sums of money, to be paid by each town, but are to settle and define the *ratio* of expense to which each shall be subjected. *Rockingham et al.* v. *Westminster*, 288.

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10. And where the commissioners found the expense of the construction of a bridge to be $1,890 20, and apportioned $600 to one town, and $150 to another town, of that sum, and the county court, in passing upon the report, regarded the sums apportioned to the respective towns, not as the amount they are actually obliged to pay, but as fixing with the estimated expense of the bridge, the *ratio* which they are liable to have apportioned, and accepted the report and adopted as the *ratio* of apportionment the sum that $600 bears to $1,890, in the one case, and the sum of $150 bears to $1,890 in the other. It was held, upon application for the writ of *certiorari*, that the petitioners had no right to complain of this apportionment, and that there was not such error in the decision of the county court as to entitle the petitioners to this remedy. *Ib.*

See PRACTICE 5.

HUSBAND AND WIFE.

1. Where the *right* or *cause of action* accrues during coverture, the husband may sue alone. So if the right of action is inchoate before marriage and consummate after, the husband may sue alone, or join the wife; but in no case must the wife be joined, except where the cause of action would survive to her. *Little* v. *Keyes et al.*, 118.

See BOOK ACCOUNT 4; CHANCERY 36, 37, 38, 39, 40, 41; LIMITATIONS 1, 2.

INDICTMENT AND INFORMATION, *See* NUISANCE 1; CRIMINAL LAW.

INFANT, *See* CONTRACT 13, 14; PROBATE COURT 4.

INSANITY.

Whenever a man loses his memory and understanding, he is entitled to legal protection, whether such loss is occasioned by his own imprudence or misconduct, or by the act of providence. *Bliss* v. *Conn. and Pass. Rivers R. R. Co.*, 424.

INSOLVENT LAWS OF MASSACHUSETTS, *See* PROMISSORY NOTES 1.

JUDGMENT, *See* TRUSTEE PROCESS 3.

JURISDICTION, *See* BOOK ACCOUNT 1, 2, 3; CHANCERY 1, 2; JUSTICE OF THE PEACE 2; PROBATE COURT 1, 3.

JURY.

The finding of the facts by the jury is conclusive, and it will not be presumed that they have neglected to conform to the instructions given, or misapprehended their legal effect. *Walworth* v. *Readsboro*, 252.

JUSTICE OF THE PEACE.

1. In a suit against a justice for false imprisonment on a *capias* that he signed; all that is requisite for him to show is, that the original writ described the debtor as a non-resident, and that he signed the writ supposing such to be the fact. *Wright* v. *Hazen et al.*, 143.

2. Sound policy requires, in this State, that the same rule of construction be ex-

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tended in favor of the jurisdiction of justices of the peace, as is done in favor of courts of general jurisdiction. *Ib.*

LANDLORD AND TENANT, *See* FORCIBLE ENTRY AND DETAINER.

LICENSE LAW, *See* SALE 10, 11.

LIEN, *See* TROVER 1; ATTACHMENT 1, 2, 3.

LIMITATIONS.

1. A *feme covert* cannot make a promise express or implied, in her own right, while living with her husband, to remove the statute bar, and if after her intermarriage she makes part payment of a debt contracted before marriage, it will not constitute an implied promise, so as to take the account out of the statute if the six years has run. *Farrar* v. *Bessey et ux.*, 89.

2. And no promise of the husband, which can affect the rights of his wife, under the statute of limitations, can be implied from part payment, by him, of a debt contracted by his wife, while *feme sole*. *Ib.*

3. B. commenced his action upon two promissory notes dated March 2, 1832, executed by S. to B., to which S. plead the statute of limitations. B., to remove the statute bar, relied upon the following agreement entered upon the back of the two notes, signed by the defendant S., under date of August 19, 1841, in these words: "I hereby agree that I will not take any advantage of the statute of limitations on the within two notes." The court held that this agreement removed the statute bar, and that S. was technically estopped, by his agreement, from making this defense. *Burton* v. *Stevens*, 131.

4. A claim that arose under the statute of limitations passed in 1797, but not being barred, before the passage of the act of 1832, is, in terms, controlled by that act, after it took effect. *Royce* v. *Hurd*, 620.

5. And it was held, that the distinction between the act of 1797 and 1832, is, in fact, this,— that in the former, if the statute began to run, it continued to run, while under the latter, the debtor must either remain in the State, or leave sufficient known property here, out of which his debt could be satisfied, or else the statute would not produce a bar. *Ib.*

6. And this property must be estate real or personal, unembarrassed, and which is liable to be levied upon for the satisfaction of the debt; and this estate should so continue, during the whole period of the debtor's absence from the State, in order to continue the operation of the statute, or the statute of limitations would cease to run. *Ib.*

LISTERS.

1. The appraisals and assessments which listers are commissioned to make, (as also, whenever it is the evident intention of the law that they shall act solely upon their own judgment and discretion,) are of a judicial character, and they incur no personal responsibility, when not actuated by malice. *Fairbanks & Co.* v. *Kittredge et al.*, 9.

2. But in regard to the other duties enjoined upon the listers, their acts, for the most part, if not universally, are ministerial. *Ib.*

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3. The duty of the listers under the act of 1847, Section 1, to "set in the list the "appraised value of all real and personal estate in each school district severally," was in its character wholly ministerial. *Ib.*

4. And where the members of a firm carried on business in school district number 1, and their personal property, on the first day of April, 1848, was in said district, except such as they had sent abroad for sale; it was held, that the statute does not authorize an ideal separation of their joint property, so as to set a portion of the property in school district number 2, where one of the partners resided, but the property should be designated as being in school district number 1, where a portion was actually situated,— where the partnership business was carried on, and where a majority of the partners resided. *Ib.*

5. And if the firm suffer any injury and damage from the listers setting their property or a part thereof in some other school district, they will be liable, and the firm can sustain an action against them. *Ib.*

See GRAND LIST.

MANDAMUS, *See* PRACTICE 22.

MERGER, *See* CHANCERY.

MORTGAGE, *See* CHANCERY 7, 8, 9, 10, 51, 52; DEED 1.

MOTION.

A motion to dismiss a suit must be for causes apparent on the face of the written proceedings, and that which requires proof *aliunde* can only be taken advantage of by plea, and issue joined thereon. *Conn. and Pass. Rivers R. R. Co.* v. *Bailey*, 465.

See ABATEMENT 2, 4; APPEAL 2; BOOK ACCOUNT 3; PLEADING 1; EXCEPTIONS 2.

NONSUIT, *See* BOOK ACCOUNT 6.

NOTICE, *See* PRACTICE.

NUISANCE.

1. Where the fee of land is vested in a town, or in an individual, yet if the use and occupancy be in the public, as a highway or common, any obstruction thereof is a nuisance, for which the persons making such obstruction, may be presented by indictment. *State* v. *Atkinson et al.*, 448.

2. A public common in such case, may be described as a highway. *Ib.*

OFFICER, *See* PROCESS 2.

OFFSET, *See* REVIEW 1; SALE 11.

PARTIES.

The enactment, that the town "shall be liable to make good all damages," &c., is held to render them immediately answerable for the official misconduct or neglect of the officer, to any person sustaining injury thereby. This is neither more nor less than the liability of the officer himself. Both are made liable in the

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same form of action, and may be subjected upon the same evidence. Hence, a joint action can be sustained against the two parties liable. *Lyman* v. *Windsor et al.*, 575.

See FACTOR 2; PROMISSORY NOTES 6; PLEADING 4.

PARTNERSHIP.

1. Where goods were delivered before any publication of the dissolution of the partnership, and the retiring partner still remained in the store, though in the capacity of clerk, but with the old sign up, it was held, that the credit must be regarded, as fairly given to the partnership, and that the vendor of the goods, in regard to dealings was entitled to the same notice, as if the first dealing had been before the actual dissolution of the copartnership. *Amidown et al.* v. *Osgood et al.*, 278.

2. A partner, who was known to be a member of the firm, upon retiring from the firm, must publish notice of such retirement, in some newspaper where advertisements are inserted, and published in the place where the business is done, in order to shield himself from liability for the future debts of the firm, to those, even, with whom they had had no previous dealings. *Simonds* v. *Strong et al.*, 642.

3. And as to those with whom the firm have had dealings, actual notice is requisite. *Prentiss* v. *Sinclair*, 5 Vt. 149. *Ib.*

See TRUSTEE PROCESS 1.

PATENT.

1. Where a person held a patent for an improvement in making friction matches, the invention being only a new combination of old materials before in use, consisting in a composition formed of phosphorus, with the earthy material and the glutinous substance only, without the presence of chlorate of potash, or of any other like objectionable ingredient; it was held, that any person may use any one, or all the materials forming the composition, in making matches, provided he does not use them in the combination patented, or that any one may lawfully use them for such purpose, in combination with chlorate of potash, as they were formerly used. *Byam et al.* v. *Eddy*, (U. S. Circ. Court,) 666.

2. But a mere colorable difference or slight variation of the combination, would not exempt a person from the charge of infringement. *Ib.*

3. The defendant, upon the service of an injunction, having executed a bond to the plaintiffs, acknowledging the validity of the patent, and the plaintiffs' right to all that is granted by it. *Held*, that it is no evidence of a breach of the injunction, further than the recital in it, that the defendant had infringed the patent, may have a tendency to establish such breach; and that the inference or presumption arising from it may be overcome by credible and positive testimony. *Ib.*

PAYMENT.

1. Where there was an agreement between the parties to a promissory note at the time it was executed, that a book account, in favor of the maker and against the payee, should be applied in payment of the note upon settlement, and the amount due on book exceeded the amount due on the note at the time the note was in-

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dorsed, the fact being proved is a sufficient defense to a suit brought by an indorsee to recover the value of the note of the maker, when the note was indorsed over due. *Pecker* v. *Sawyer*, 469.

2. The case of *Nichols* v. *Holgate*, 2 Aiken 138, considered and confirmed. *Ib.*

See SALE 11.

PLEADING.

1. That which goes to the whole merits of the action, cannot properly be pleaded in abatement, nor can it be tried on a motion to dismiss. *Peck et al.* v. *Barnum and Trustee*, 75.

2. If a declaration is defective, that question should be made upon demurrer or in arrest of judgment. *Beals* v. *Olmstead*, 114.

3. James H. Farrar commenced an action in general assumpsit by his guardian, H. D. Farrar, and the defendants plead in abatement, that H. D. Farrar was not a legal guardian of the minor, and had no right to commence the action. The question arising upon demurrer, as to the legality of the appointment of the guardian, it was *held*, that so long as the decree of the probate court making the appointment, remained unappealed from, or unreversed, this court is bound by the adjudication of the probate court, and that third persons cannot plead the matter in abatement of suits commenced, and in this collateral manner nullify the decrees of the probate court. *Farrar* v. *Olmstead et ux.*, 123.

4. *Scire facias* against one of two joint recognizors, and the administrators of the other, is clearly a misjoinder, and may be taken advantage of on demurrer, where it appears upon the face of the declaration. *Treasurer* v. *Frisbi et al.*, 134.

5. If one assume to justify, by special process of *capias*, he should in his plea, state such facts as justify that form of process. *Wright* v. *Hazen et al.*, 143.

6. Where the plaintiff, in an action for the neglect of the town clerk to prepare and keep an *alphabet* or *index*, in order to show that the damage he sustained, was the result of, and caused by this neglect of the town clerk, set forth in his declaration the following averments or statement: "That upon the occasion of the negotiation and purchase of the premises by the plaintiff, and before completing "the same, and for the purpose of assuring himself that the premises were free "from incumbrance, he made an examination of the records of deeds in the town "clerk's office, and by reason of there being no alphabet, index or reference pointing to that mortgage deed, or the record thereof, he was caused and led to believe, and did believe that there was no incumbrance upon the same, and that "thereupon he completed and closed, on the 31st day of March, 1845, his purchase of the premises." It was held, on general demurrer, that the fact is sufficiently stated that the damage of the plaintiff was the result of, and caused by that neglect of the town clerk. *Hunter* v. *Windsor et al.*, 327.

7. And it was also held, that it was not necessary to aver in the declaration that the plaintiff made a specific request for the *index* or *alphabet*. *Ib.*

8. And it was also held, that the words, "debts now due," in the act of 1848, dividing the town of Windsor into Windsor and West Windsor, should be held as synonymous with the word liabilities, whether arising *ex-contractu* or *ex-delicto*. *Ib.*

9. Where the plaintiff, in an action against the town and town clerk, for a breach of official duty on the part of the town clerk, set forth in his declaration, the

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averments, in substance, that the town clerk, being inquired of by the plaintiff, at the time of their negotiation, (the said negotiation being with the town clerk for the purchase of certain lands,) whether there was any incumbrance of record upon the land which he was about to purchase, and being requested, if there was, to show the record of it to the plaintiff, neglected and refused to show the record, and did not disclose the fact that such incumbrance existed, but concealed the same. The inquiring and request of the plaintiff, being alledged to have been addressed to the defendant in his official capacity, and his conduct which ensued, being also alledged in the same character, it was *held*, that the facts alledged are sufficient to entitle the plaintiff to redress under the statute. *Lyman* v. *Windsor et al.*, 575.

10. And where it was further charged, that although defendant Edgerton knew the plaintiff to be ignorant of the incumbrance, he concealed the fact of its existence, furnishing no clue or guide by which the record of it might be discovered, *held*, that an official neglect and violation of duty are sufficiently alledged. And that the additional averments of this count, that the plaintiff was thus induced to complete his purchase, believing the land to be unincumbered, except by the lease to Dunbar and White, and was consequently obliged to incur a heavy loss by the reason of the previous mortgage to George and Edward Curtis, held that a legal cause of action is here stated, as well against the defendant town, as against the town clerk. *Ib.*

11. And it was *held*, that the liability of the town, in a case of this description, is equally original and direct as that of their delinquent town clerk or constable. And that no previous recovery or suit against the officer, is necessary in order to perfect a right of action against the town for his default. *Ib.*

See AGENT 3, 4; CONTRACT 16; NUISANCE 1, 2; PRACTICE 6; PROBATE COURT 2; PROMISSORY NOTE 7.

POSSESSION, *See* CHANCERY 46, 47, 48; TRESPASS 2; TRESPASS QUARE CLAUSUM FREGIT 2, 3.

PRACTICE.

1. If on trial in the court below, the court charged the jury on questions, some of which may be doubtful, or even if there is error; yet if from the whole case it clearly appears that on another trial a similar verdict must inevitably be rendered, a new trial will not be granted. *Walworth* v. *Readsboro*, 252.

2. If a question is not raised in the court below, it cannot be urged or insisted upon as forming any ground of error in the supreme court. *Amidown et al.* v. *Osgood et al.*, 278.

3. If the orator claim an account on certain obligations set forth in his bill, which are denied in the answer, but other and different obligations admitted in the answer, sufficient to entitle the orator to an account, upon the basis of an answer; and the orator desires to have an account taken even upon the basis of the answer, in the event of failing to compel the account, which he claims, in his bill; he should obtain leave to file a supplemental bill, alledging in the alternative, the facts admitted in the answer. But if instead, the answer be traversed, and on trial, the orator fail to support the facts relied upon in his bill, he cannot fall back and claim an account, upon the basis of the answer. *Ormsby* v. *Low*, 436.

4. The question of negligence is a mixed question of law and fact; and it is the duty of the court specifically to instruct the jury, whether the facts, which the testi-

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mony tends to prove, will, if found by them to be true, constitute that negligence which will defeat the action. *Trow* v. *Vt. Central R. R. Co.*, 487.

5. Upon a petition for a road, the first committee appointed made examination and were nearly ready to report, when one of the number died. It thus became necessary to have some one appointed in his place, and a new examination. Under these circumstances, *it was held*, that this increased expense was necessarily incurred, in executing the commission, and must be regarded as taxable costs in the suit, as much as any other portion of the expense. *Howard et al.* v. *Colchester et al.*, 644.

6. Upon the question, how far it was competent for this court, in a case standing upon pleadings and demurrers, to revise any decision of the county court, except upon the very point upon which the case was made to turn in that court, *it was held*, that if the judgment is found erroneous, and reversed, it then is the settled practice of this court to look into all the issues standing upon the record, and render such a judgment, as the county court should have rendered. *Wires et al.* v. *Farr*, 645.

7. Upon the question, how far it was necessary, in this court, for either party to state objections to testimony, in the course of the reading, *it was held*, to be the practice of this court to hear all the testimony read, in hearing appeals from chancery, which was read in the court of chancery, and then to hear the parties on all questions arising on the merits, and on all formal exceptions properly taken in the court of chancery, and which appear on the papers. *Ainsworth* v. *Prentiss et al.*, 646.

8. The party who merely refers to cases, in his opening argument, without reading, is understood to acquiesce in such authorities not being read; and unless they are read by the opposite side, he is not strictly entitled to take them up again. *Cutler* v. *Estate of Thomas*, 647.

9. This court is but a court for the correction of errors in probate cases, the same as in all other cases, and could not, with any propriety, exercise a discretion in regard to allowing costs, upon trials had in the county court. *Allen* v. *Rice*, 647.

10. And to bring any such questions before the supreme court, the matter must be decided by the county court, and their decision, and the grounds upon which it is made, stated upon the record, with the objections of the party; and if any question of law is thus raised, it may probably be revised by the supreme court. *Ib.*

11. In the case of a petition for divorce, the testimony of neither party is admissible on the main issue. *Manchester* v. *Manchester*, 649.

12. Nor is the wife a competent witness, under the act of 1852, for or against her husband, in any civil suit or proceeding. *Ib.*

13. Where there was an appeal, under the statute of 1852, from a decree of the chancellor dissolving an injunction, and the plaintiffs objected, that the notice, being merely from the counsel, and not from any order of the court, was insufficient; it was held, that the notice was sufficient. *Adm'r of Smith* v. *Adm'r of Wainwright*, 650.

14. The act of 1852 provides, that the appeal "shall be heard, on the application of "either party, at the next session of said court sitting in any county in the State, "either in regular or circuit session." *Held*,—this, in terms, contemplates the next session after the appeal, if there is time to give notice in season for the

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hearing at that term, and if not, at the next session, at which such notice can be given. *Ib.*

15. And when a case is brought into such term, it properly belongs to the docket of that county, and must be disposed of, the same as the other business of the term, at the regular term, if the time is sufficient, and if not, at the circuit session for that circuit. *Ib.*

16. A motion to recommit the report of an auditor, will not be entertained by the supreme court, when the case stands upon exceptions. *Hutchinson* v. *Onion*, 654.

17. The rule of trial, on an appeal from the decree of the chancellor, dissolving an injunction, is the same as in other appeals, and the parties must be confined to the evidence used before the chancellor. *Tarbel* v. *White River Bank et al.*, 655.

18. The party making the motion, is to go forward in the argument. *Ib.*

19. A case, brought into the supreme court, standing upon issues of law, on demurrer and the judgment of the county court being reversed, and repleader awarded, should be retained, until by the new pleadings, some issue of fact is joined whereby it becomes important to remand the case to the county court. *Kinsman* v. *Paige*, 656.

20. The reversal of a judgment of the county court, only opens such issues as were affected by the errors, for which the judgment is reversed. *Ib.*

21. Where there were apparently two perfect records of the proceedings of a town meeting, it was held, that *parol* evidence must of necessity be resorted to, to determine which is the legitimate record. *Walter* v. *Belding et al.*, 658.

22. And where the books of record of the town, are wrongfully held by a person claiming to be the town clerk, the writ of *mandamus* is the proper remedy; and the same may with propriety be supplicated by the legal town clerk himself; but if done by the town agent, in behalf of the town, is no such fatal irregularity, as to defeat the proceedings. *Ib.*

See EXCEPTIONS 1.

PRINCIPAL AND SURETY.

M. as principal and W. as surety, executed a promissory note to G., for two hundred dollars. M. made a contract with G., in which G. agreed, on the payment of one hundred dollars on the said note, within two days, that neither of the signers should be called upon for the balance, until certain property, placed in G.'s hands as security, was disposed of, and if not disposed of within six months, interest should not be cast after that time. It was held, that this contract did not discharge W., the surety, from his liability, though made without his knowledge or consent. *Wheeler et al* v. *Washburn*, 293.

See EVIDENCE.

PROBATE COURT.

1. The orders and decrees of the probate court, when acting within the sphere of their jurisdiction, are as conclusive as the orders and decrees of any other court acting within their jurisdiction; and the supreme court cannot, in a collateral manner, review the correctness or propriety of the decrees, or of any matter within the jurisdiction of the probate court. *Lawrence* v. *Engleby*, 42.

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2. And upon a petition for the removal of an administrator, for causes that existed to the same extent when the decree was made, as they did at the time the petition was brought,— the administrator pleads the decree of the probate court in bar to the petition, and on demurrer, it was held, that the plea was sufficient. *Ib.*

3. And also, upon those in interest having neglected and waived an appeal from the decree appointing the administrator, it was held, that the whole matter of the petition had become adjudicated, and all interested thereby concluded. *Ib.*

4. When a minor has no parent living who is authorized to act as his guardian, on application of such minor or of any relative or friend, the probate court may appoint some suitable person, and under this provision of the statute, whenever the appointment of a guardian is made by the probate court, notice is not required to be given to any one. *Farrar* v. *Olmstead et ux.*, 123.

5. The statute provision requiring the final decision consequent upon an appeal, to be certified back to the probate court, is for the purpose of enabling the probate court to conform its action to the law of the case as settled upon the appeal; rather than to restore jurisdiction or to furnish notice to that court of the general result of the appeal. *Green et al.* v. *Clark, Adm'r*, 136.

6. Where an appeal had been taken from a decree of the probate court establishing a will, and a final decision against the will, (which was the only matter involved in the appeal,) had been regularly made, some eight years before the appointment in controversy, it appearing that the estate was not adapted to a special and limited administration, but demanded one with the ordinary powers and responsibilities, it was held, that the probate court could rightfully grant the administration which was needed, though the judgment annulling the will had not been certified to that court in obedience to the statute. *Ib.*

7. When an applicant prosecutes a bond, as provided in the Compiled Statutes, p. 374, Sec. 2, having obtained permission from the probate court, and neglects to cause his name to be indorsed on the writ, as prosecutor of the same; if the defendant goes to trial on demurrer to the declaration, or has a trial on the merits, and the case passes to subsequent terms of the court, it is a waiver of the objection. *Probate Court* v. *Strong*, 146.

8. And where the applicant at the time of the return of the writ, lodges a certified copy of the bond, and a certificate that permission has been granted to prosecute the bond, with the clerk, it is sufficient to give him all the rights of a prosecutor, though the clerk neglects to make his entry of the same. *Ib.*

9. The matter of appointing and removing administrators is a matter exclusively within the jurisdiction of the probate court, and a decree of this kind cannot be attacked in a collateral manner more than any other judgment. *Steen, Adm'r*, v. *Bennett et al.*, 303.

10. The probate court have the power, so long as the case is pending either in that court, or in the common law courts, on the bond, to re-open and re-examine any of their former decrees in the premises, and correct all errors, irregularities and mistakes. *Adams* v. *Adams*, 21 Vt. R. 162. *French et al* v. *Winsor*, 402.

11. A decree in the probate court, that an administrator ought to render his account is not a final decree. Such decree is regarded as affording a sufficient basis upon which to predicate a suit upon the bond given to secure the performance of the orders of the probate court. *Ib.*

12. Probate proceedings, where the title of land comes in question, are required by

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statute to be recorded in the town clerk's office, as much as in the probate office, and unless so recorded they are not admissible as evidence of title. *Royce* v. *Hurd*, 620.

See APPEAL 2; PLEADING 3.

PROCESS.

1. The authority issuing a writ of execution, may authorize some one specially to serve the same, when it is against a town. *Walter* v. *Dennison*, 551.

2. A demand made upon the very person who is treasurer of the town, though not made upon him as treasurer, but as an officer of the town, (if made twelve days before the levy of the execution,) for payment of the execution, is sufficient. *Ib.*

See PLEADING.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. Where a note was neither executed nor payable in Massachusetts, nor did the plaintiff or his factors reside there,—*held*, that the insolvent laws of Massachusetts could have no operation upon the rights of the plaintiff or his factors, without their express or implied consent. *Blackman* v. *Green et al.*, 17.

2. When the purchaser, for goods bought of commission merchants or factors draws the note payable to the order of the signers, and the indorsement was simultaneous with the signing of the note, and was essential to render the instrument operative, it must be regarded in effect as a note to the plaintiff or the owner of the goods. *Ib.*

3. And upon the insolvency of the signers of the note, if the factors without the knowledge or consent of the plaintiff, caused the note to be presented and proved in their names, though this might be sufficient to bar them of all other and independent remedies in respect to the note, it will not affect the rights of the plaintiff; for the factors cannot by virtue of their *lien* for commission, put the plaintiff's interest in manifest jeopardy by resorting without necessity to an unusual course, at least until they have given him notice of the *lien* and an opportunity to discharge it. *Ib.*

4. It is now regarded as settled law in this State, that a person beneficially interested in a simple contract, or in a promissory note, may sue and sustain an action in his own name, upon the same. *Rut. & Burl. R. R. Co.* v. *Cole*, 33.

5. And where C., for assessments upon stock in the Rutland and Burlington Railroad Company, gave his note, "for value received payable to the order of Sam "uel Henshaw, treasurer, &c." It was held, that the plaintiffs might, by parol evidence, show that they are the persons from whom the consideration moved, and to whom the note was in fact given. *Ib.*

6. And it was also held, that an action might be sustained upon the note in the name of the Corporation. *Ib.*

7. And it was also held, that in declaring upon the note, it was not necessary for the plaintiffs to alledge in their declaration, that the note was made payable to them, by the name of their treasurer. *Ib.*

8. A promissory note made on Sunday, but not delivered until some other day is valid. *Goss* v. *Whitney*, 187.

9. What constitutes a delivery. *Ib.*

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10. If A. cause a note payable to him, to be transferred and made payable to B., for the purpose of keeping the same out of the reach of the trustee process, it would be fraudulent as to the creditors of A.; and the maker of the note could properly be adjudged trustee of A., so long, at least, as it remained in the hands of A. or B. or of any other person cognizant of, and privy to, such fraudulent intent. *Marsh* v. *Davis et al.*, 363.

11. The fact that a note was purchased and put in suit for the purpose of harassing the defendant, is no defense to an action brought to recover the value of the note. *Ormsby* v. *Gilman*, 437.

See PRINCIPAL AND SURETY 1.

RAIL ROAD, *See* VT. CENTRAL R. R. CO.; ACTION ON THE CASE.

RECORD, *See* DEED 1, 2, 3; EVIDENCE 14, 15; PROBATE COURT 12; SHERIFF 5.

RECOGNIZANCE, *See* ARREST; AUDITA QUERELA.

REPLEVIN.

1. *Replevin* will lie against an officer, who attaches property, by leaving a copy in the town clerk's office, brought by some person other than the debtor, and so also, with *trespass* and *trover*. *Angell* v. *Keith*, 371.

REVIEW.

In an action of book account, brought originally to the county court, where the defendant files a matter in offset, in assumpsit, or other contract, not on book, exceeding one hundred dollars, neither party is entitled to a review of the issue upon the plea in offset. *Hall et al.*, v. *Hall*, 637.

SALE.

1. Under a conditional sale or contract, the general property never passes, and when the payment of the stipulated price, under such sale, is made a condition precedent, payment must be made before the title vests in the purchaser. *Davis et al.* v. *Bradley et al.*, 55.

2. But where S. & C. sold a quantity of wool to B. & H. B., and sent them an absolute and unconditional bill of sale, advising them by the bill of sale, that the wool was shipped to Bradley & Co., at Burlington, subject on its arrival, to their order, of which immediately after its arrival, B. & H. B. took possession. It was held — that the bill of sale passed an immediate and vested title to the wool, in B. & H. B. *Ib.*

3. A bill of sale, absolute and unconditional in its terms, and free from ambiguity, is governed by the same principles that regulate other written instruments, and parol testimony cannot be received to contradict, add to, or vary it, for "the "bill of sale must be considered as the final contract between the parties." *Ib.*

4. S. & C. sold a quantity of wool to B. & H. B. and shipped the same to Burlington, to the care of B. & Co., and sent a bill of sale to B. & H. B., advising them, in said bill of sale, that said wool was shipped to the care of B. & Co., and subject to their order; upon the arrival of the wool at Burlington, said B. & H. B.

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took possession of, and assorted the same, and re-shipped twenty-one sacks, and consigned the same to D. & A., at Boston; taking at the time, a receipt for the same of B. & Co., forwarding merchants; the said receipt B. & H. B. sent to said D. & A., and also made a draft upon them, for the full value of the wool; the said draft was accepted and paid by said D. & A. The said wool, after it was thus re-shipped, and while *in transitu*, was attached as the property of B. & H. B, and brought back and placed in the store-house of B. & Co., for safe keeping. In an action of TROVER, brought by D. & A. against B. & Co. for said wool, it was *held*,— that S. & C. are concluded, *by their acts*, from denying the title and right of B. & H. B. to this property, by the execution of their bill of sale, and order, for the delivery of its possession. And that B. & H. B. were equally concluded by their consignment of the property to D. & A., and their draft on them for its value. And that B. & Co. were also concluded from denying D. & A.'s title to the property, and their right to immediate possession by the execution of their receipt for the same, as forwarding merchants. *Ib.*

5. And it was also held, that so far as D. & A. were concerned, the *acts* of all these parties operate as an estoppel *in pais*, preventing them from making any claim to this property, even, if as between B. & H. B. and S. & C., the property was wrongfully disposed of by B. & H. B. *Ib.*

6. When the vendor's statements form the sole basis of the sale, his declarations are ordinarily to be regarded as a warranty. *Beals* v. *Olmstead*, 114.

7. So also where the article is bought for a particular use, and the vendor knew that the vendee would not buy an inferior article, the sale of the article for the particular use, ordinarily implies a warranty that it is fit for the use. *Ib.*

8. And unless it is apparent that vendor's statements, in regard to the quality of the article, were understood by the parties, at the time, as amounting to nothing more, than recommendations of the goods, and were matters of opinion merely, and the vendee was still left to understand, that he must examine and judge for himself, the case should be submitted to a jury, unless there is a fatal variance. *Ib.*

9. A deed of machinery prior to the act of 1838, would be void as against the creditors of the grantor, unless accompanied by an absolute change of possession. *Quere* — whether such a deed is brought within the provisions of the said act *prospectively*, from and after the act took effect. *Wilworth* v. *Readsboro*, 252.

10. If a person sell spirituous liquors in this State, without a license, and in direct violation of the positive provisions of the statute, such sale is illegal, and he can sustain no action therefor. *Boutwell* v. *Foster*, 485.

11. The illegality of such a sale, will equally prevent a recovery thereon, when plead in offset; a court of justice will not lend its aid to enforce payment, for such illegal sale, in any form in which the parties may present it; nor will they, on the other hand, relieve from payment, when it has been made. *Ib.*

See BOOK ACCOUNT 7; STATUTE OF FRAUDS 2.

SCHOOLS, *See* SCHOOL DISTRICT.

SCHOOL DISTRICT.

1. By implication, the prudential committee of a school district must have the right to occupy the school house, when the school is in operation; but the statute

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or implications growing out of the general powers and duties of the prudential committee, does not give him the exclusive control of the school house, in his district, that power must be in the district. *Chaplin et al.* v. *Hill et al.*, 528.

2. Where a district, at a meeting for that purpose, voted to have a private school in the school-house, and nothing appeared, but if it had been permitted to proceed, it would have answered all the purposes of a public school, and been open to all the children in the district, and taught all the branches of common school instruction enumerated in the statute, and no others; under these circumstances, it was held, that there was nothing inconsistent with the rights of the district, in allowing the school to continue there *for the time being merely;* but that the district clearly could not confer any exclusive right to the possession of the school-house, for any definite time upon any one. *Ib.*

3. It was also held, that the privilege which was conferred upon the plaintiffs was of a legally beneficial character, and the defendants for causelessly and wantonly disturbing them in the enjoyment of the same, are liable to an action, and that *case* is the appropriate remedy. *Ib.*

4. The inhabitants of the school district have no estate in any form, in the property belonging to the district, and the district alone can bring trespass *quare clausum fregit.* *Ib.*

See LISTERS 3, 4.

SCIRE FACIAS.

1. Where a debtor was committed to jail on *mesne* process, and gave a jail bond, it was held, that before a suit could be sustained for an escape, there must be a demand made for the bond, and a refusal to assign it, that the statute contains no exceptions, and the court cannot make them, unless in the most obvious cases of necessity. *Spear* v. *Holmes et al.*, 547.

2. It was also *held*, that the fact that the jail bond was found in possession of the family of a former jailor in another State, affords no necessary presumption, that a demand would not have been available. *Ib.*

SHERIFF.

1. An officer acquires a special property in the goods or chattels, by attaching them in a manner authorized by statute; and by the same means he also acquires a sufficient possession, to enable him to support trespass or trover for any wrongful taking or conversion of the property. *Blodgett* v. *Adams*, 23.

2. And the action can as well be sustained against the defendant in the attachment, as against a stranger. *Ib.*

3. The statute does not imply a bailment of the property so attached from the officer to the defendant in the process; and such defendant can only interfere, by express permission of the officer, or to secure the safety and preservation of the property. *Ib.*

4. When an attachment is made by one officer, and the execution is delivered to another, in order to perfect the lien, the creditors are not only bound to place their execution in the hands of a proper officer within thirty days from the recovery of judgment, but cause the property to be demanded of the officer making the attachment within that period, by the officer holding the execution. *Ib.*

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5. Where a deputy sheriff, on the first day of December, 1847, took the oath of office and left his deputation and oath with the county clerk for record, and paid the clerk for recording the same, and it remained in the county clerk's office until the August following, and the clerk then recorded it upon a book in his office. *Held*, that though the record was perfected at a subsequent time, constructively it must be deemed to exist from the time the instrument was lodged for record, and that the officer was authorized to act as a deputy sheriff, and had competent authority to act as such, from the time he so left his deputation *bona fide* for record. *Ferris* v. *Smith*, 27.

6. Where the plaintiff and his attorney were present on the day of sale, and directed the officer to sell the property according to the statute, and for cash, it was held, that the officer was bound to follow these instructions, and that he had nothing to do with former conversations or arrangements between the parties. *Walworth* v. *Readsboro*, 252.

See EVIDENCE 1; REPLEVIN 1.

STATUTE OF FRAUDS.

1. Where the plaintiff contracted with the defendant for the lease of defendant's tavern house for one year, and delivered to defendant a gold watch in part payment for the rent, and the parties agreed to meet at a future day to make and execute a written lease, it was *held*, that this case falls within the statute of frauds. *Hawley* v. *Moody*, 603.

2. It was also *held*, that the property in the watch passed to the defendant, and might have been sold by him, or legally attached upon his debts. *Ib.*

STATUTE, *See* PRACTICE 14, 15.

SURETY, *See* CHANCERY 1, 4.

TAXES, *See* GRAND LIST; COLLECTOR.

TENANCY, *See* CHANCERY 49; DEED 4.

TENDER.

1. The acceptance of money paid into court, operates as a payment, *pro tanto*, and also as a conclusive admission of the conditions upon which it was paid into court. *Goslin* v. *Hodson et al.*, 140.

2. Money paid into court, not in pursuance of a tender made before the suit is brought, must, to be available, include the costs in the suit up to that time. *Ib.*

3. Where bank bills were placed on the table in the presence of the plaintiff, the amount stated, and capable of being taken into immediate possession, if plaintiff had been willing to receive it, and was duly paid to the auditor, and is brought into court, it was held, that this was a good tender, and sufficiently conformable to all legal requirements. *Curtiss* v. *Greenbanks*, 536.

4. Where money is tendered and refused, the person tendering it is at liberty to use it as his own; all life is under obligations to do is, to be ready at all times, to pay the debt in current money, when requested. *Ib.*

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5. But if the tender is of specific articles, the property tendered cannot be re-taken, or disposed of in any way, by the person tendering. *Ib.*

TOWNS.

1. Lyman Ballard, a minor, whose legal settlement was in the town of S., was infected with the *small pox* while residing in the town of B., the selectmen of said town of B. provided physicians, nurses, and necessaries for said Lyman, and he was not of sufficient ability to pay said expenses; but his father was sufficiently able to pay them. It was held, in an action brought by the town of B. against the town of S. to recover said expenses, that the town of S. was *primarily* liable to the town of B. for whatever sum they had actually expended in providing physicians, nurses, and necessaries for said Lyman. *Brattleboro* v. *Stratton*, 306.

2. It is the duty of the town clerk to provide an *alphabet* or *index*, for the book of record used for recording evidences respecting titles to lands or real estate, and to keep and preserve the same for inspection and use, with the same truthfulness and care, that he is required to exercise in keeping the books of record, and when an injury has been sustained by any one, by reason of neglect in this respect, the town is liable under the statute. *Hunter* v. *Windsor et al.*, 327.

3. But to enable a party to sue for such neglect, it must appear that the neglect to keep such an *alphabet* or *index*, was the cause of the damage he has sustained. *Ib.*

TRESPASS.

1. In an action of *trespass* for assault and battery, where the defendant plead *son assault demesne*, and the plaintiff replies *de injuria sua propria*, the plaintiff may prove that defendant used more force than was necessary, and that an excessive battery was committed. *Bartlett* v. *Churchill*, 218.

2. And these pleadings present two questions of fact to be tried and decided; first, did the plaintiff commit the first assault; secondly, if so, did the defendant use any more force than was necessary in his defense. *Ib.*

3. And where, upon this issue, these facts are not found by the referees or the county court, and no question of law arising in the case, the supreme court will not decide whether the defendant is guilty or not guilty, for these are questions exclusively to be found by the referees of the county court; it being the duty of the supreme court only to decide upon such legal questions as may arise upon facts previously found to be true. *Ib.*

See COLLECTOR 1.

TRESPASS QUARE CLAUSUM FREGIT.

1. In an action of trespass *quare clausum fregit*, the plaintiff having title to one-half of the premises, it was held, that he might recover the whole damages. *Hibbard* v. *Foster et al.*, 542.

2. Where B. entered upon a certain lot, claiming to be the owner of the same, and during the winter seasons took timber therefrom, from time to time, it was held, that these acts, (he having good title to one-half,) gave him possession of the whole lot, as against every one but the true owner. *Sawyer* v. *Newland*, 9 Vt. 383. *Ib.*

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3. It was also held, that this possession B. might convey to his grantees, and that it is not necessary that these acts of possession should be renewed from year to year, to enable B., or his grantees, to maintain trespass. All that is required, is, that there should be continued claim. *Ib.*

See SCHOOL DISTRICT 4.

TRESPASS ON THE CASE, *See* ACTION ON THE CASE.

TROVER.

1. When A. hired a piece of land of B. for which he was to pay B. a certain price per acre for the use of the land that season, and the stalks after the corn was harvested, it was held, that B. had no *lien* upon the corn for the payment of the price agreed upon, and that B. was a wrong-doer in taking the corn, hence no demand was necessary before suit brought. *Loomis* v. *Lincoln*, 153.

2. If A. sell to B. sheep, that B. had before leased to A., and at the time of the sale B. knew that they were the same sheep he had leased A., it is not a conversion of the sheep so sold, and B. cannot maintain trover against A. for the sheep. *Downer* v. *Rowell*, 343.

See SALE 4.

TRUSTEE PROCESS.

1. Members of a partnership, a part of whom reside in this State, and a part in another State, who form their partnership and carry on their partnership business in this State, can be held chargeable as the trustee of one to whom they are indebted in this State. *Peck et al.* v. *Barnum and Tr.*, 75.

2. If a trustee makes but a partial disclosure, without giving a full statement of all the facts, as well those that would operate to his discharge, as those which would charge him as trustee, the judgment will furnish him no protection; the trustee, from his relation to the payee of the note, as well as for his own security, should notify the payee of the note of the pendancy of the proceedings. *Marsh* v. *Davis et al.*, 363.

3. And if the payee and his assignee are neither made a party to the trustee proceeding, and both remain ignorant during the whole proceeding of that suit, they will not be bound by the judgment. *Ib.*

TRUST AND TRUSTEES, *See* CHANCERY 34, 35, 38, 40.

TURNPIKE COMPANY.

1. Where the Railroad Company took a portion of the old road and made a substitute, as their charter provides, it was *held*, that was sufficient to justify the Turnpike Company in using it as a portion of their road, and that their continuing to use it as a portion of their road, keeping their gates closed and taking toll, and actually repairing this portion of the road, was sufficient to establish it as a portion of the Turnpike Company's road, which they were bound to keep in a state of ordinary safety for the use of travelers, day and night, so far as this could be done by ordinary diligence. *Mathews* v. *Wincoski Turnpike Co.*, 460.

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2. The same diligence is required of Turnpike Companies, which is demanded of towns, to insure safety to travelers upon the highways, and they, as well as towns, are primarily liable to the traveler. *Ib.*

VERMONT CENTRAL RAILROAD COMPANY.

It is the duty, by law, of the Vermont Central Railroad Company, to erect and maintain such fences and cattle guards, upon their road, as will prevent horses and other animals from passing them,— as held in *Quimby* v. *Vermont Central Railroad Company*, 23 Vt. 393. *Trow* v. *Vt. Cent. R. R. Co.*, 487.

See ACTION ON THE CASE 2, 3, 4, 5, 6, 7, 8.

WAIVER, *See* PROBATE COURT 7; ARREST 3.

WARRANTY, *See* SALE 6, 7, 8.

WILL, *See* PROBATE COURT 6.

WITNESS, *See* EVIDENCE.

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APPENDIX.

HON. CHARLES KILBORN WILLIAMS, L. L. D.,

LATE CHIEF JUSTICE OF THE SUPREME COURT.

We have deemed it not inappropriate to place this brief memorial of one of the most distinguished ornaments of the bench, in this State, in the annual volume of the reports of the decisions of that court, where he presided for a longer term than any other one, since the foundation of the State government. This fact alone, in a State where the election of judges is annual, is altogether decisive of the general estimation in which his services, as a judge, were held. One may possibly hold a subordinate place for a long time, or the first place for a short time, and not justify such an inference; but it is impossible to believe that any one should preside over the deliberations of the highest judicial tribunal in the State for thirteen years successively, with annual re-elections, and not possess eminent, we think we may say almost unrivalled qualifications, for the place.

And such, we believe, has been, and will always be, the general estimation in relation to the services of the Hon. Charles Kilborn Williams, L. L. D., late Chief Justice of this court, who died suddenly at his residence, in Rutland, during the night of the 9th of March, A. D. 1853, aged seventy-one years. Chief Justice Williams was born at Cambridge, Massachusetts, January 24th, 1782. His father, the late Samuel Williams, L. L. D., was, at the time, the Professor of Mathematics in Harvard College, but removed to Rutland, in this State, when his son was about seven years old, where the father and the son both resided till their death.

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Dr. Samuel Williams, as a scholar and divine, and especially as the early historian of the State, has left a very abiding and enviable reputation. And it is no doubt attended with many advantages, to receive one's education under the eye of such a father, which, without that, no mere culture of the schools can fully compensate. Charles K. Williams graduated at Williams' College, in the year 1800, and studied the profession of law in the office of the Hon. Chauncey Langdon, whose daughter he subsequently married, who survives her husband. They had eight children, all of whom, save one, survived their father. Judge Williams was more than commonly happy in all the domestic relations, as he was also eminently qualified to impart happiness in those relations. His home seemed his chief solace and support during the exhausting labors of his long judicial service.

He first came to the bench of the Supreme Court in the year 1822, and remained but two years. He then served in the office of Collector of the Customs for the district of Vermont, during the administration of the younger Adams, and returned to the bench in the fall of 1829, where he remained till the fall of 1846, when he declined a re-election. He was two years Governor of this State, and declined a re-election, just before his death.

It could answer no good purpose, perhaps, to dwell upon the character of this faithful servant of the State, in one of the most critical and exhausting, and, at the same time, least obtrusive, departments of the public service. It is probably true that his merits, as a judge, were as justly, and as highly estimated, by his fellow-citizens, as those of any other. If he was less known out of the State, it is because he had studiously avoided connecting himself in any way with the law journals, even by allowing them the publication of his opinions, in advance of the regular reports, which is not uncommon. But with him, these things had too much the appearance of pretension, or love of publicity, on the one hand, and of condescension and subserviency on the other, to meet the full approbation of that severe sense of propriety, by which his own course was prescribed. He was possibly on this account less known, and more highly esteemed, where he was known. For it is certain, that many of his opinions have received more marked commendation from law writers of eminence, out of the State, than perhaps almost any others in our reports. And in regard to the jurisprudence of the State, (whatever it is,) so far as the reports

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are concerned, it unquestionably bears more distinctly the impress of his mind than of any other one.

And whatever differences of opinion may exist in regard to the excellencies, or defects, of the late Chief Justice Williams, we can scarcely remember any one, whose virtues more decidedly preponderate, or whose judicial character could be more justly presented, as a model. His mind was active, and almost electric, in its movements, and at the same time, so patient as to be far more than ordinarily sure of reaching a just conclusion, and in the shortest possible time. And if he sometimes flagged in the severity of his attention, under a protracted argument, it was not while the speaker was drawing new truths from the old fountains and deep foundations of the law. His sense of justice, his incorruptible integrity and impartiality; his willingness to suffer and to be sacrificed, if need be, in defense of truth and innocence, or in bringing falsehood and fraud to its merited reward; his purity, his dignity, his urbanity; his simplicity and singleness of heart, in all the relations of life, present his character, as at once the brightest for admiration, and the safest for imitation. If it should be thought by any, that like the patriarch, he had little to tempt him from, and much to support him in his high course of virtue and integrity, and that he was therefore deserving of less commendation; although we certainly would not disparage, in any sense, the quiet decency and respectability of judicial life, one can scarcely refrain from feeling sometimes, that where the elections are annual, the salaries quite disproportioned to those paid in private life, for equal service, and the labor immense, and, at times, almost overwhelming, the position is not altogether so well calculated to sustain the mind and support the heart, as some others. And we trust it will not be regarded as offensive or personal, to say that the mere uncertainty of the tenure of the judicial office, while it is undoubtedly a safeguard to the State, is always a proportionate embarrassment to the incumbent, and one which, because it is not generally understood, is not sufficiently taken into the account, in estimating the relative proportion of service and compensation.

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